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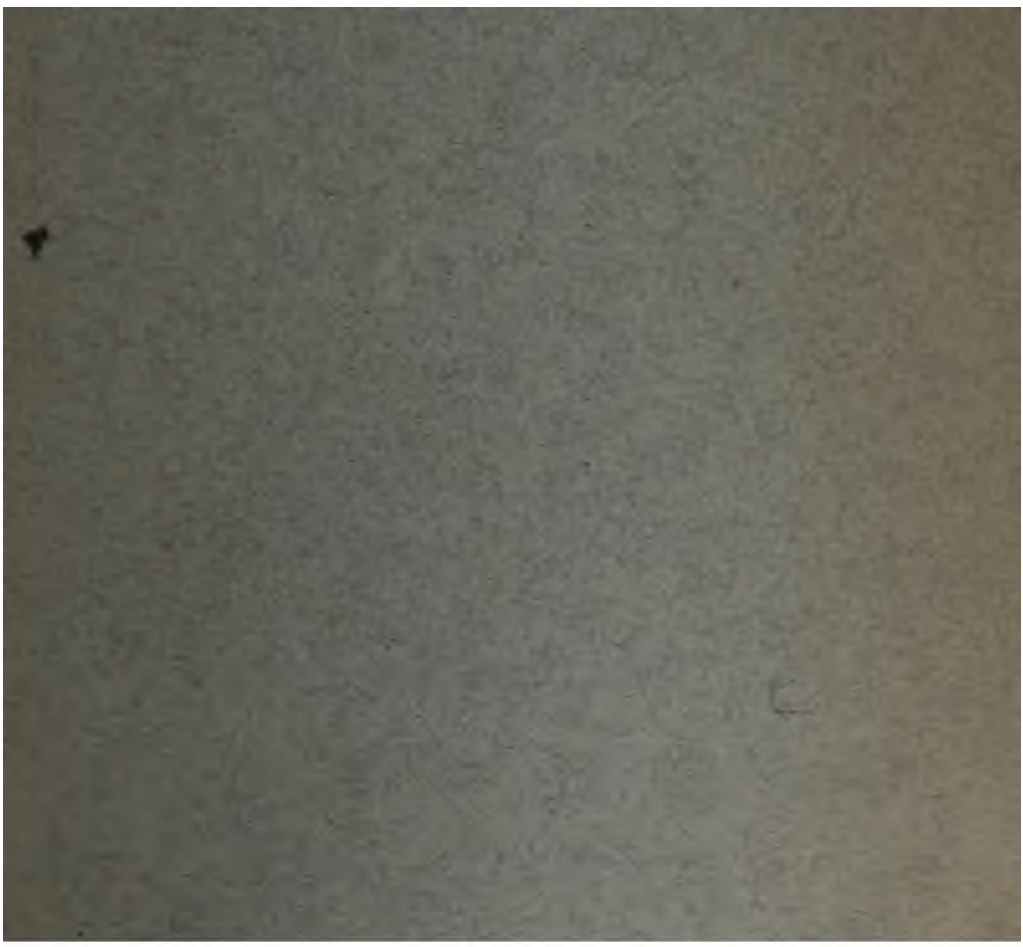
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BULLETIN OF THE UNIVERSITY OF WISCONSIN

NO. 342

ECONOMICS AND POLITICAL SCIENCE SERIES, VOL. 6, NO. 1, PP. 1-336

A CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES, 1850-1887.

BY

LEWIS HENRY HANEY, PH. D.

Assistant Professor of Political Economy,

The University of Michigan.

MADISON, WISCONSIN

JANUARY, 1910

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PREFACE

Some five years ago Professor B. H. Meyer of the Wisconsin railway commission and the university of the same state turned over to me a piece of work which he had originally planned to do himself. Unfortunately he was unable to carry out his plans in this regard. The result has been two monographs on a Congressional History of Railways,—the present one, and an earlier study which brought the work down to 1850. Professor Meyer has read a great part of the manuscript of this volume, and I am deeply indebted in many ways to his kindly interest.

It is in accordance with his truth-loving spirit that I have attempted to carry on the work. The aim has been to present the facts in such a maanner as to give an accurate and intelligible account of Congress' various railway experiences, and at the same time to afford every chance for further research or check upon the conclusions. To this end most of the statements of any consequence are backed by references to the sources,—even though the pages take on a somewhat Teutonic appearance.

I have been both bold and modest: bold in believing, as did Professor Meyer, that the work would be consulted; modest in believing that few would care to read continuously or at length. I therefore have done my best through cross references and index to bring interrelated phases of the subject together for the convenience of the casual reader.

It is my pleasure to acknowledge the benefit received from suggestions made concerning the arrangement of the present work by my honored friend and former colleague, Professor Isaac A.

Loos of the University of Iowa. The accuracy of the references and the exhaustiveness of the material partly depend upon the work of Mr. E. C. Nelson in gathering material. And no words can measure the increasing debt I owe to my wife; her help has been unfailing.

The Carnegie Institution of Washington has facilitated the investigation by a grant.

—LEWIS H. HANEY.

Ann Arbor, Mich., December 24, 1909.

A CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES, 1850-1887.

CHAPTER I

INTRODUCTION

This is a history of action and reaction between railways or railway companies and the government. A congressional history of railways is a study in the activities of our federal government in regard to transportation by rail. As was stated in an earlier volume,[1] these relations fall under the two heads, "Aid" and "Regulation." That volume traced these relations during the first half of the nineteenth century, showing that, for the most part, aid was then demanded and formed the principal topic of debate. It is, perhaps, in a young and democratic country, the normal condition. Such regulation as was considered or enforced during this earlier period was largely negative in character, consisting of measures which did not aim so much to positively modify railways and railway practice as to restrict and prevent the adoption of evil ways. This, again, seems normal. It is in keeping with the idea that the demand was for more railroads rather than better ones. The railway system was young; the mail service had just begun; land grants were just being agitated; the Pacific railways were just being projected—out of dreamland. There was no railroad problem in the modern sense. There was relatively little occasion for regulating deeply-rooted, complex evils or prescribing rules, and if there had been, the social consciousness had not yet become so comprehensive.

[1] *A Congressional History of Railways to 1850, Bul. of U. of Wis., Econ. and Pol. Sci. Series*, vol. 3 (1908); reprinted as vol. I, Madison, Wis., 1908.

The period covered by the present work extends from 1850 to 1887, from the beginning of the rapid growth of railway systems to the Interstate Commerce Act. In but a little more than a generation there was tremendous expansion in railways, in society, in social consciousness, and in government. Normally, the aid aspect became smaller and smaller, dwindling to a sort of negative aid which a railway receives when the friction of political machinery retards or prevents the hostile working of social conscience or public opinion; and regulation grew, changing from a negative disburdening of commerce from private restrictions to a more positive control. The demand for railways had become more qualitative.

Accordingly, Book I. concerns itself with federal aid, and Book III. with regulation. Book II. deals with Pacific railways. This is obviously a cross-classification. The subject, however, has such distinctness and importance that it seems best to treat it so. And it serves as a concrete example of the transition from aid to regulation. In Book II., then, there is to a certain extent a chronological study of forces treated more topically in Books I. and III. Other cases will be found in which completeness in topical development has been sacrificed to chronology,[2] but for the most part the history is topical.

On the basis of aid and regulation the history of railways during the nineteenth century might have been divided at 1870, that being about the year at which the spirit of positive regulation became dominant. But inasmuch as the two ideas are not separate but continually overlap, other bases for division into periods have been adopted. It is simply to be noted that the percentage, so to speak, of regulatory ideas grows, until about 1870 it exceeds fifty per cent. of the railway consciousness of Congress.

The importance of the thirty-seven years covered can hardly be over-estimated. They are the crucible in which the heat of growing nationalism and the forces back of the granger movement worked out a railway-regulation idea which, for good or ill, was to dominate for many years. They are the mold in which the idea was cast. To understand the spirit of the laws

[2] *E. g.*, discussion of aid in chapter on the Railway and Public Defense.

in force today their history must be grasped, and this history is broader than is commonly supposed. Were the Interstate Commerce Act of 1887 and the Sherman Anti-trust Act of 1890 the accurate embodiment of the common sense of the nation? If so, what was the economic ground back of that common sense? These are questions whose answer has present and future value. The nation entered upon a conscious policy of aiding railways through large land-grants and loans of public credit. The results are instructive, to say the least, and the question arises, why did the *nation* not construct railways like those to the Pacific? Strong historical arguments bearing on the expediency of government ownership are involved in the answer.

A congressional history of railways necessarily throws light on political subjects. From one point of view the present volume is a summary record of one phase of Congress' activity from which some judgment as to that body's efficiency may be drawn. In this connection the question will be put: has Congress a memory?

Neither in this volume nor in the one preceding has the mistake been made of ignoring a consideration of railway history outside of Congress. The general setting of the congressional history has been continually borne in mind, nor has attention been confined to congressional material. It is surprising, moreover, how nearly complete a history of railways might be drawn from such material, so often in the country do inventors, projectors, and complainants make their voices heard in the federal legislature.

A question which may arise concerns the validity or weight of certain speeches, votes, etc. It is the writer's belief that such material generally has its significance. Even speeches printed but not delivered were composed for a purpose, which purpose must be to please a constituency. In nine cases out of ten the attitude of the Congressman will reflect that of his section, and for this reason the name of his State is generally shown. It is not necessary that he be learned or sincere. Does he represent his constituency, is the question. Care has been taken in each case in answering this question.

BOOK I

AID TO RAILWAYS

CHAPTER II

LAND GRANTS: 1850–1887

Time and Extent of the Grants

Beginning with the second half of the nineteenth century came the epoch of the railway land grants. During the twenty-two years following 1850 large donations were made to states for railways or to the corporations direct, till some 155,000,000 acres had been granted and over 49,650,000 acres had been actually certified or patented. Of this latter amount, 667,741 acres had been forfeited.

On June 30, 1886, the lands certified or patented to the various states for railways stood as follows:[1]

Alabama	2,929,300
Arkansas	2,517,718
Florida	1,760,834
Illinois	2,595,053
Iowa	4,709,959
Kansas	4,638,170
Louisiana	1,072,406
Michigan	3,229,010
Minnesota	7,809,348
Mississippi	935,158
Missouri	1,395,429
Wisconsin	2,874,048

In addition to these grants to states over 14,184,000 acres had been certified or patented from grants made direct to railway corporations.

The bare history of dates and amounts is quickly told. Beginning with the 3,751,711 acres granted for the Illinois Cen-

[1] *Rept. Secy. Int.*, 1886, 2: 300.

tral, Mobile and Ohio, and Mobile and Chicago roads on September 20, 1850, hardly a congress passed without some grant, until the last one was made in 1871. In 1873 and 1874 several acts were passed, extending time for railways in Wisconsin and Minnesota; but thereafter extensions ceased and a movement for forfeiture grew.

By administrations the estimated grants are as follows:[2]

	Acres.
Fillmore (1850–1853)	8,198,593
Pierce (1853–1857)	19,678,179
Lincoln (1861–1865)	74,395,801
Johnson (1865–1869)	34,001,297
Grant (1869–1877)	19,231,121
Total	155,504,994

The system may be said to have reached its culminating point during the years 1862–66, inclusive, some 108,397,000 acres being granted within that period, or about 70 per cent. of the total. This was the time of Pacific railway charters.

As a result, in part, at least, of such munificence, the secretary of the interior could announce that on June 30, 1886, the construction of land-grant railways, as reported, equalled 17,724 miles.[3]

[2] Donaldson, *Pub. Domain*, p. 273.

[3] This construction was distributed as follows:

States and Territories.	Miles.	States and Territories.	Miles.
Alabama	901.43	Minnesota	2,144.11
Arkansas	602.24	Mississippi	384.00
Arizona	383.00	Missouri	625.75
California	1,037.91	Montana	780.00
Colorado	298.60	Nebraska	768.52
Dakota	410.98	Nevada	446.00
Florida	639.97	New Mexico	167.00
Idaho	90.00	Oregon	325.80
Illinois	707.00	Utah	225.00
Indiana	241.35	Washington	463.60
Iowa	1,547.64	Wisconsin	973.50
Kansas	1,485.65	Wyoming	500.00
Louisiana	530.00		
Michigan	1,045.01	Total	17,724.06

THE DEVELOPMENT OF THE LAND-GRANT QUESTION IN CONGRESS: 1850-1870[4]

1. *Land Grants to States: 1850–62.* The passage of the Illinois Central land-grant bill did not break the way at once for similar legislation. Numerous bills were introduced at the 1850–51 session, there being at least eight in the Senate and nineteen in the House, but none of them passed. During these first few years between 1850 and 1856 there was considerable discussion over the subject, and much objection to land-grants was made. It was not until 1856, at the first session of the 34th Congress, that effective opposition broke down.

The opposition arguments were largely constitutional. Under this general idea of constitutionality, however, were two groups: on the one hand, the southern strict-constructionists; on the other, the old states of the East. As one speaker put it: "There are two classes of objectors to this policy. The one fancies that the sovereignty of the states is infringed by the measure, as a system of federal internal improvements. The second conceives that the sovereignty of the United States is invaded, unless the old states shall have donated to them an equal amount of land without any consideration whatever."[5]

The attitude of this latter group is illustrated by Mr. Washburn (Me.) in making a plea for a land-grant to Maine for railway purposes.[6] He began by claiming it as her due in return for the early cession of her lands, but proceeded to base his argument on grounds common to all the old states. The deeds of cession by Virginia and the others authorized no distinction in favor of the new or land states; and it certainly could not exist where the lands had been acquired by conquest or purchase, by the blood and treasure of the old states. And he appealed to the justice and magnanimity of the new states, exclaiming, "Gentlemen of the New States! give us something—enough to assure us of your good neighborhood—and you will

[4] Cf. Sanborn, *Cong. Grants of Land in Aid of Railways*, chaps. VI, VII.
[5] *Cong. Globe*, 1851-52, append., p. 928. Mr. Freeman (Miss.).
[6] *Ibid.*, p. 289.

not only secure the lion's share of these lands, but the strongest relations of friendship and fraternity between all the states."

The same line of distinction, looked at from the other side, is shown by Mr. Freeman (Miss.).[7] He spoke as a member of the committee on public lands whose railway measures the House had been refusing to adopt. He maintained, first, that the lands originally ceded to the federal government were to be used for two distinct ends: to pay the public debt, and to build up new states; second, that lands acquired later from Spain, France, and Mexico were by the terms of treaty consecrated to the same purposes; and, lastly, that grants of alternate sections of public lands to railways would be entirely constitutional, and "the surest mode of increasing the public revenue, and encouraging the growth of new Republican states in our public domain."

Railway land-grant bills had been solidly supported by the northwestern states, but had been defeated largely by southern votes—Virginia, the Carolinas, and Georgia being as solidly opposed. The representatives of the old states held that such grants were for the sole benefit of the new states and that therefore they were unequal and unconstitutional. But Mr. Freeman held that this objection could not apply to bills then before the House, for they concerned links in a chain of national roads with the object of connecting the new with the old. The new states, said he, are but nurseries planted for the old.

He summed up the consideration received by the federal government in return for land grants as embracing (1) the right to transport the mails at her own price, thus making the railways national post-roads; (2) the right to transport military supplies free of charge, thus making them national military roads; (3) the enhanced value of the public lands in the vicinity of the roads.

Typical of the opposition of southern congressmen, referred to by Mr. Freeman, are the words of Mr. Bayly (Va.).[8] In discussing the constitutional power of Congress over the public domain he stoutly maintained that the "new idea"[9] that Con-

[7] *Ibid.*, p 928.
[8] *Ibid.*, 1853-54, append., p. 405; also, 1854-55, p. 286.
[9] See below, p. 162 et passim.

gress could properly appropriate land or money for internal improvements under the war power was a subterfuge and a perversion of the constitution. In reply to the argument that land grants benefited the government by increasing the sale of public lands, he said, that the demand for such lands was limited by the wants of the people for occupation and cultivation, and that in the long run no more lands would be taken up than were necessary for the requirements of our growing population. In a word, the enhanced value idea seemed fallacious to him.

It is to be observed that there is an element of truth in Mr. Bayly's second contention, if we take the matter from the long-time standpoint.

During the 33rd Congress (1854–55) only one land-grant act passed Congress.[10] At the last session applications for grants to some 5,000 miles of road aggregating nearly 20,000,000 acres were presented, but down through this time the opposition had been strong enough to keep such bills well in check. In 1854, there was somewhat of a panic which put a momentary damper on railway enthusiasm, and in December of that year President Pierce's annual message referred to numerous bankruptcies and put the question: "Even admitting the right of Congress to be unquestionable, is it quite clear that the proposed grants would be productive of good, and not evil?"

Beginning in 1856 with the first session of the 34th Congress, however, came a perfect flood. There was relatively little objection on constitutional grounds, though the representatives of southern states like Virginia and Kentucky spoke against various bills as being for federal internal improvement, not of national importance, etc.; and one can not but wonder at the change.

The reasons for it are fairly clear. Just prior to the crisis of 1857 railway construction was very rapid and many lines were projected to the West. Between 1840 and 1850 a little more than 20,000 miles were constructed, and of this number 5,894 miles were added during the years 1854 and 1855—nearly 6,000 miles! Naturally the pressure for land grants was great.

The Illinois Central grant had proved profitable to the rail-

[10] See below, p. 185.

ways concerned and this, together with other donations, now began to be effective as entering wedges. What one state had received must be granted the others.

Though the Democrats were in power and Pierce was at the helm yet the new state element had become very strong, and, moreover, men were coming to realize that no great immediate profit was to be realized from the public domain.

Considerable emphasis has been laid upon the corruption factor,[11] and this seems justifiable. This was just the time when corporations were beginning to multiply and grow strong. Great quantities of eastern capital flowed into western railway developments and pressure was brought to bear on eastern congressmen. Calhoun, Clay, and Webster were gone, and the new generation of congressmen does not seem to have been as noble-minded as the preceding one. Charges of corruption were frequent at this time.

In 1856 some 14,559,000 acres were granted to states for railways; in 1857, 5,118,000 acres were added—making a total of 19,678,000 acres in round numbers.[12] Alabama, Florida, Iowa, Louisiana, Michigan, Minnesota, Mississippi, and Wisconsin were favored states.

Then came the crisis. Railway building was checked. The nation's surplus revenue disappeared and a deficit of over $27,000,000 arose in 1858. For five years no land-grant bill passed Congress.

Nor did the connection which undoubtedly existed between land-grant-stimulated railway construction and the crisis pass unnoticed. Mr. Mason (Va.) was forcibly impressed with the conviction that the revulsion resulted from "the improvident cessions made of the public lands in the immense northwest country, for the building of speculative railroads."[13] Soldiers'

[11] Sanborn, *Cong. Grants of Land in Aid of Railways*, p. 55.

[12] Donaldson, *Pub. Domain*, p. 270.

[13] *Note on the crisis of 1857:* Contemporaneous congressional material bears witness to the severity of the crisis and depression. One speaker says of the railways, " . . . there are very few making returns for the capital invested in them," and concludes that the freight business is generally unprofitable. (*Globe*, 1856-57, p. 1598f.) Another testifies: "Railroad companies are not rich. A majority of them are poor and embarrassed. . . . I have before me a list of railroads in some fourteen of the States. Out of 205 of them only 70 make any return to the stockholders; and 135 of them pay nothing to

bounty lands and others had been bought up by speculators for from 80 to 90 cents an acre and then railway projects had been started to enhance the value of the lands—upon which enhanced land value would largely depend the railways' credit.

2. *Land Grants to Corporations and States: 1862–72.* When the generosity of Congress again began to flow, a noticeable change appeared in the machinery. The grants began to be made direct to railway corporations in 1862. The state continued to be used as an intermediary, but some of the largest grants were made to the ultimate recipients at once. This would seem to mark the all but complete downfall of constitutional objections on the score of state sovereignty or federal internal improvements. These roads, however, were to a considerable extent constructed in the territories, concerning whose power to administer the grants there was doubt; and the bills did not pass without discussion over the rights of the states to regulate, tax, etc., some recognition of state sovereignty being found in many of the direct grants.

According to Donaldson, the list of railway corporations receiving grants is as follows:[14]

		Acres.
1862	Central Pacific	6,500,000
1862	Central Branch Union Pacific.....	265,000
1862	Kansas Pacific	6,000,000
1862	Union Pacific	9,050,000
1864	Burlington and Missouri R.....	2,441,000
1864	Sioux City and Pacific	45,000
1864	Northern Pacific	42,000,000
1866	Oregon Branch, Central Pacific....	2,127,000
1866	Oregon and California	2,500,000

those who have furnished the money to build them." (*Globe*, 1861-62. p. 1480f.) The opinion that there was a general social cause for the situation soon became widespread. In addition to the above statement by Mr. Mason the words of Senator Palmer may be cited: "Liberal legislation and a speculative spirit among our people led to overbuilding and misbuilding, and upon emerging from the crisis of 1857 many railroads found themselves embarrassed . . . " (*Cong. Rec.*, 1885–86, p. 3476.) Some realized that a result of this "misbuilding" and crisis was a crystalization of debt—the fastening upon society of increased fixed charges. Moreover, from this time may be dated the beginning of corporate concentration. (*Ibid.*) These things attended the reorganization.

[14] *Pub. Domain*, pp. 270–72.

1866	Atlantic and Pacific	22,672,000
1866	Southern Pacific	5,260,000
1866	St. Joseph and Denver City.....	470,956
1869	Denver Pacific	800,000
1870	Oregon Central	1,000,000
1871	Branch Line Southern Pacific.....	2,500,000
1871	Texas Pacific	13,000,000

With the exception of the grant made to Kansas for the Atchison, Topeka and Santa Fe in 1863 (2,995,000 acres) all the grants to states made after 1862 were either small or were merely renewals of earlier grants.

Rights of Way

In 1852 a general right-of-way act was passed;[15] and, in 1855, another act extending the same to all of the public lands of the United States. The operation of these laws appears to have been satisfactory, for in 1862 their provisions were extended for a term of five years.[16]

In 1873 a bill granting a general right of way through the territories passed the House, but not the Senate; and it was not till 1875 that such a bill became law.[17] The courts had long decided that the right of eminent domain did not lie in territories and that Congress must act. This led to a multitude of special acts and Congress was pestered with bills granting rights of way of various widths and including all sorts of allowances for stations, etc.[18]

Thereafter the matters most dealt with under this head concerned amendments to earlier right-of-way acts, rights of way through military and Indian reservations, and some special acts.

The End of the Land-Grant Policy

About 1870 the opposition to further land grants became so strong as to indicate the end of the policy. In that year the

[15] *Bul. of U. of W., Econ. and Pol. Sci. Series*, 3 : 337 ; reprint, vol. I, p. 171.
[16] Chapter 179.
[17] Below, p. 189.
[18] *E. g.*, see host of bills at the 1874–75 session.

House agreed to this resolution, submitted by Mr. Holman (Ind.): "Resolved, That in the judgment of the House the policy of granting subsidies in public lands to railroad and other corporations ought to be discontinued; and that every consideration of public policy and equal justice to the whole people requires that the public lands of the United States should be held for the exclusive purpose of securing homesteads to actual settlers under the homestead and pre-emption laws, subject to reasonable appropriation of such lands for the purpose of education."[19] And but a little later Mr. Garfield (O.), in speaking on the last great land grant, explained his support in these words: "I fully share in the general sentiment of the country, that we ought to put a speedy and effective end to the policy of granting public lands to railway corporations," but justice to the South dictates this one.[20]

In 1868 one plank in the Democratic platform was a pronunciamento to the effect that "when grants of public lands may be allowed, necessary for the encouragement of important public improvements, the proceeds of the sale of such lands, and not the lands themselves, should be applied." Both Republican and Democratic parties in 1872 asserted that they were opposed to further land grants.

Discussion on bills of the time reflects the same sentiment.[21] The prevailing idea seems to be hostility to "corporate monopoly" on the one hand, and solicitude for settlers or homesteaders on the other. This is well illustrated in the debate on extending time to the St. Croix and Bayfield Railroad. It was referred to as a swindling system, by which the public lands of the government had been given away to corporations regardless of public interest. A coterie of speculators was building large private fortunes at the expense of the people. The lands held in trust for the people should not be given to soulless and heartless corporations. The House refused to pass the measure, in the face of great pressure, by a vote of 102 to 84[22]. At the 1870–71 session at least eighteen land-grant bills were brought

[19] *Cong. Globe*, 1869-70, p. 2095.
[20] *Ibid.*, 1870-71, p. 1468.
[21] See *e. g.*, *ibid.*, 1870-71, pp. 1143; 20, 790, append., p. 90.
[22] *Ibid.*, p. 918.

up in the House and not discussed or passed, and besides these there is a list of forty-one bills which were only considered to the extent that the committee of reference was discharged.

One sees here the working of the Granger spirit,[23] and the reaction against the Pacific railways.[24] It had come to be felt that land grants had been excessive if not unnecessary. As the country grew in wealth and population, the opinion came to be frequently expressed that private enterprise would alone supply all needful railroads.

Extensions of time were still made, but partly in the interest of settlers who had taken up the even-numbered sections along railway lines at $2.50 an acre and who might be supposed to suffer if the railway were not constructed. In using this argument the railways, of course, assumed that the grant was necessary to the completion of their lines.[25]

[23] See below, p. 240 ff.

[24] Below, p. 81 f.

[25] For full discussion giving a good insight into the land-grant situation at this time see debate in the *Globe*, 1871–72, p. 1274, etc., on S. Bill no. 1274.

CHAPTER III

LAND GRANTS: 1850–1887 (Continued)

The Movement to Forfeit Land Grants: 1870–1887

Almost as soon as the land-grant movement was checked a demand for the forfeiture of grants already made sprang up. In many cases the railway would be unable to live up to the conditions of the grant, generally the time requirement, and it was demanded that in such cases the lands be thrown open to settlement. In 1870, for example, there was a bill to forfeit certain lands granted to the Placerville and Sacramento Valley Railroad;[1] and a grant to Louisiana for the New Orleans, Opelousas and Great Western was actually revoked.[2]

The early discussions and this forfeiture had assumed that when the conditions of the grant were not complied with the land reverted to the grantor. But in 1874 came a decision by the supreme court which overturned this idea and was of fundamental significance in all the later land-grant history. This decision was in the case of Schulenburg vs. Harriman.[3] The facts are these. In 1856 Congress granted lands to Wisconsin for a railway,[4] and in 1864 enlarged the grant and extended the time. No construction was carried out and the time expired, yet in 1874 no steps had been taken to forfeit the grant. The plaintiff in the suit was in possession of the lands and had cut a quantity of lumber. This a representative of the state seized and the suit was brought to recover it, the question being did the state possess the land? Plaintiff maintained that the grant was not *in praesenti:* that the state only received a permissive

[1] *Cong. Globe*, 1870–71, p. 234. Passed the House.
[2] *Statutes at Large*, 16: 227.
[3] 21 *Wallace*, 44.
[4] Above, p. 18.

right to dispose of the lands on certain conditions. It was contended that the lands reverted to the government upon failure to comply with these conditions, and that this was in accord with public policy in that Congress should not be required to act each time in order to secure forfeiture. Public grants are to be strictly construed.

In defense it was argued that the provision of the grant concerning reversion merely defined the conditions under which forfeiture might be declared and that the lands were not forfeited until Congress so declared. Meanwhile title remained in the state and she could not dispose of the lands until the road was completed.

The court upheld this view of the case. The grant was held to be *in praesenti,* immediately transferring title, although subsequent proceedings might be necessary to give precision to that title and attach it to specific tracts. A provision that all lands remaining unsold after ten years should revert to the United States if the road were uncompleted, was a "condition subsequent." No one could take advantage of a condition subsequent in such a case but the grantor or his heirs or successors, and if they did not see fit to assert their rights the title remained unimpaired in the grantee. Moreover, if the grant were a public one, the reserved right of the grantor for breach of condition must be positively asserted by judicial proceeding or legislative enactment.

In 1876 an act was passed which forfeited certain railway lands in Kansas to the United States.[5] In 1863 lands had been granted to Kansas for a road from Leavenworth south to the state boundary, the road to be completed in ten years. It had only been constructed as far as Lawrence, however, and there was a desire to have the interior department declare the grant forfeited. But that department cited the above decision against such action, holding that where a grant of land was made for any particular purpose and the conditions of the law were not complied with, the government must repossess itself of control over the land before it could be opened to entry and settlement.

[5] *Cong. Rec.,* 1875-76, p. 1415.

This could only be done by act of Congress, and hence a bill was introduced for that purpose.

In discussing the bill, a desire was shown by some to pass a general law of forfeiture for the many railways which had not lived up to the stipulations of their grants. The House, however, was not ready for such action. It was objected that grants varied greatly in nature and that forfeiture would be harsh in some cases.

As amended by the Senate the bill simply provided that all lands granted for this company, and which had not been patented under the grant nor earned by the completion of the road, should be declared forfeited and open for entry.

From this time on bills for forfeiture were regular, and numerous long reports on the subject indicate its importance and doubtfulness.

In 1878 there was a bill in the House which proposed to restore to the public domain all lands granted to states and corporations for railways which were forfeited through failure to fulfill the conditions of the grant.[6] The committee on public lands reported that nearly 100,000,000 acres would be restored if the bill were passed.[7] A large portion of these grants had been withdrawn from entry for over twenty years! They were held by corporations, which were, in many cases, mere skeletons,—"rings," using the lands as the basis of credit "at the general expense of the country and of innocent purchasers of their worthless stock." An immediate remedy was demanded.[8]

Again, in 1880, a bill having special reference to Pacific railways was reported by the committee on Pacific railroads.[9] The committee, while believing the land-grant policy had been justified, stated that public opinion had been outraged by enormous and unnecessary grants of public lands equal to principalities and empires of the old world. The bill proposed to forfeit all lands not earned by construction, thus restoring 106,500,000 acres according to the committee's report. Further aid was

[6] *H. J.*, 1877-78, pp. 416, 516; also a resolution, p. 412.
[7] *H. Rep.*, 1877-78, no. 911.
[8] See *Annual Rep., Comm'r. of Gen'l Land Office*, 1877, pp. 12-15.
[9] *H. Rep.*, 1879-80, no. 691.

to be given in the shape of loans. The committee maintained that the Northern Pacific grant should at once be forfeited.

The movement for forfeiture reached its height in 1884. Bills and reports were numerous. All the political parties demanded forfeiture. The National and Anti-Monopoly parties had strong, direct planks. The Republicans' was not so clear, reading as follows: "We demand of Congress the speedy forfeiture of all land grants which have lapsed by reason of non-compliance with acts of incorporation, in all cases where there has been no attempt in good faith to perform the conditions of said grants." In this year the act of 1866 granting lands to the Iron Mountain Railroad was repealed, and from this time on there were many forfeitures.

Perhaps it may not be amiss to briefly outline one or two contemporaneous cases of land-grant administration which come to light in the reports and which will illustrate some of the abuses which led to demands for forfeiture. The passage of a bill to forfeit lands granted to the Girard and Mobile Railroad Company in Alabama was demanded on the following grounds:[10] The grant was made in 1856, on condition that the road should be completed in ten years. The road was located in 1858 and some 55 miles were completed before the war; then in 1866 a few miles were built, but in 1870 the road was only 84 miles long. Up to 1861 a large part of the grant was certified to Alabama, though no official record of completion was found; but apparently none was certified to the railroad company nor used for the purpose of the road. After the war the company seems to have taken it for granted that the grant had lapsed and to have forgotten all about it.

At this point, one Abraham Edwards, registrar of the land office at Montgomery, came upon the scene. Knowing of the grant he made a contract with the company by which he was to receive 10 per cent. of all lands he might get for it, and one-tenth of the lands which had been certified to the state—but not to the company—was forthwith conveyed to him. Edwards was also to get 5 per cent. for additional lands. Altogether he and his associates received over 96,000 acres for managing what

[10] *H. Rep.*, 1884-85, no. 2501.

was regarded as a steal, which item was carried on the books of the company as "in payment of services to commissioners and agents in selecting lands and obtaining certificates for same."

Great tracts of land were disposed of by the company to speculators at from five to ten cents per acre, a quit-claim deed being given.

Now duties should go with rights and as a land-grant road the Girard and Mobile became subject to laws requiring the free use of its road for troops, discounts on mail service, etc., involving a loss of $39,014. Whereupon it admitted the land grant was invalid, asked to be released from the status of a land-grant road, and offered to repay purchasers of the lands. The frying pan of censure and forfeiture was preferred to the fire of pecuniary loss.

In the same year with the Alabama grant, Michigan received lands for certain railways. The donation was duly accepted and confirmed upon the Marquette and State Line and Ontonagon and State Line companies.[11] There were several consolidations, first with the St. Paul and Fond du Lac, then with the Chicago and Northwestern. In 1862 the Marquette grant was declared forfeited by the state's board of control and bestowed upon the Peninsular Company, the Northwestern consenting, and a change in route was authorized. But for fourteen years no construction was carried out. In 1867 and 1868 the governor of Michigan certified the grant back to the government, as he supposed; and the government sold large quantities to settlers. It turned out that the Ontonagon part had not been certified back, and,—sheltering behind the Schulenburg vs. Harriman decision—in 1880 the Ontonagon and Brule River Co. was formed with the purpose of "grabbing" the lands. The board of control and the state legislature then forfeited the grant of the Ontonagon and State Line, bestowing it upon the new company. One condition made was that at least 20 miles be constructed by August, 1882. The 20 miles were cheaply and imperfectly constructed, no trains being run save over 12 miles of track. Logs and brush were used to make em-

[11] See *H. Rep.*, 1883-84, no. 684.
[12] *Cong. Rec.*, 1886-87, p. 88.

bankments and even ice and snow were used to level up the ties.[12] The company then selected the appropriate number of sections, not coterminously, but toward the southern extremity of its *located* line where the land was improved and iron was found. This it claimed as its right under the provisions of the law authorizing it to select "within any 20 continuous miles of said road as originally located."

The company resisted forfeiture on the ground that the lands had been conferred upon them, certified by the legislature, the 20 miles constructed and the lands selected, all before any action to forfeit. The House committee reported in favor of forfeiture, but such action was not carried out until 1889, when Congress finally forfeited the grant.[13]

At least two large grants were revoked in 1885,—that to the Texas Pacific,[14] and one to a railway from Portland to Astoria and McMinnville.[15] These forfeitures applied to lands adjacent to uncompleted parts of the road.

In the following year all lands along uncompleted portions of the Atlantic and Pacific were restored to the public domain, but in this case the right of way was not forfeited.[16] And almost at the same time several grants to Alabama, Mississippi, and Louisiana were revoked, the portions adjacent to completed railways being excepted.[17]

In the last year of our period parts of the grant to the New Orleans, Baton Rouge and Vicksburg[18] were declared forfeited; but, above all, an act to provide for the adjustment of all congressional land grants to railways and for forfeiting unearned lands was passed.[19] By this comprehensive law the secretary of the interior was authorized and directed to take immediate steps to adjust all land grants in accordance with supreme court decisions. All patents erroneously issued were to be cancelled and the title restored to the United States.

This did not mean general forfeiture: that did not come until

[12] *Statutes at Large*, **25**: 1008.
[14] *Ibid.*, **23**: 37.
[15] *Ibid.*, 296; *H. Rep.*, 1883-84, no. 383.
[16] *Ibid.*, **24**: 123.
[17] *Ibid.*, 140. Gulf and Ship Island not forfeited.
[18] *Ibid.*, 391.
[19] *Ibid.*, 556.

1890. It was, however, an important step toward settling the land-grant problem. Complaint over the great bodies of land withdrawn from entry has already been noted. Early in the history of land grants the interior department adopted the policy of withdrawing all the lands, including those within the indemnity limits, as soon as a map of the line was filed, and virtually holding them until the railways found it convenient to select their lands.[20] There seems to have been no express authority for the practice but precedent and the force of custom. This favored the railway over the settler and caused much criticism. Bills were introduced to restore lands held within indemnity limits, and such restoration was an object of the general act of 1887.

The Homestead Policy and Railway Land Grants

Down through 1850 there was no considerable conflict between the homestead idea and the policy of aiding railways by land grants.[21] After the Civil War, however, certain developments in the operation of each policy brought them more and more in conflict; and in the end the interests of settlers under homestead or preemption laws was a chief factor in bringing the land-grant epoch to a close.

The reasons are numerous. For one thing the growing hostility to corporate activity which culminated in the Granger Movement intensified an apparent conflict; and the operations of the railway companies were in many cases so fraudulent and overbearing that a real conflict existed. "Steals" and "grabs" came normally to be associated with land grants. The operations of "speculators" had the same tendency. Again, at the close of the war, the demand for lands—to give to the soldiers—was greatly increased. These things, coupled with the growing realization that land grants were no longer economically desirable, wrought the change.[22]

[20] See *H. Rep.*, 1883–84, no. 1849.

[21] *See Bul. of U. of W., Econ. and Pol. Sci. Series*, 3: 374; reprint, vol. I, p. 208.

[22] See *Cong. Globe*, 1870–71, p. 20; append. 90, 122, etc. In this debate on extending time to the St. Croix and Bayfield the situation is clearly apparent.

Homestead Settlers on Railway Grants

From early times there was friction between the railways and settlers, actual or prospective, within the limits of lands withdrawn for the railways. Naturally enough when these huge slices of public domain were withdrawn they were not found tenantless and conflicts arose over title; and the situation was made more difficult by certain rulings of the interior department.

Accordingly we find a host of memorials and bills of the following tenor: to relieve homesteaders whose certificates had been cancelled by the government because of conflicts with land grants to various railways;[23] to confirm titles to bona fide homesteaders whose rights conflict with the claims of railway companies;[24] legislation relieving settlers upon whom the land department had served notice that unless an additional $1.25 per acre was paid their entries within the limits of railway grants would be cancelled;[25] to grant additional rights to homestead settlers on public lands within railroad grants;[26] to reduce the price of such lands;[27] and the like. Such measures were numerous to the end of the period.

In some cases the homesteaders improved their holdings with the railway's consent; then there would be a change in management and the settlers' titles would be defeated in the courts.[28] And in many instances such individuals would settle with all assurance from the railway company for which the lands were withdrawn that they would not be disturbed pending the patenting of the land and that then they should have the privilege of purchasing first; then, in the final adjustment and location of the grant or in case of forfeiture, large bodies of land would be restored to the public domain and the settlers upon them find they had no title.[29]

[23] *E. g., H. Misc.*, 1873-74, no. 242.
[24] *Ibid.*, no. 165.
[25] *Ibid.*, 1875-76, no. 73.
[26] *H. J.*, 1878-79, p. 103.
[27] *Ibid.*, p. 233.
[28] *E. g., H. Rep.*, 1882-83, no. 1939.
[29] *H. Rep.*, 1879-80, no. 1512.

To meet these and similar difficulties, Congress passed several acts between 1870 and 1887 which must briefly be noted. In 1875 a House bill for the relief of settlers on lands within railroad limits became a law.[30] It enacted that, in the adjustment of all railway land grants, if any lands were found in the possession of actual settlers whose entries had been allowed subsequently to the time at which, by the ruling of the land office, the right of the railway attached, the railways might relinquish such lands and take others in lieu thereof. The entries of the filings of the settlers might be perfected with complete title as though no grant had been made. The act was not to be construed as confirming any decision of the interior department.

Then in 1876, as the result of a long and most interesting debate,[31] came an act to confirm preemption and homestead entries of public lands within the limits of railway grants.[32] This act was aimed at two chief evils: first, early settlers on lands later granted to railways, when they desired to change, could not transmit a valid title, but technically "abandoned" their lands; second, by decision of the secretary of the interior, as soon as a land-grant railway resolved upon a certain route, title immediately passed to it without patenting or local notice, so that many an unwitting homesteader found he had taken up lands which were already withdrawn.

The chief feature of the bill was its first section which confirmed entries made within railway grants before the railways notified the local land offices that the lands were withdrawn. In arguing for the measure, it was maintained that homestead and preemption laws were general, while land-grant acts were special; and that, for the harmonious operation of these general and special laws relating as they did to the same subject, it was necessary that the general laws should be fully operative until the definite boundaries within which the special laws were operative had been finally determined. By a late ruling of Secretary Delano, however, the idea had been enforced that the right of a railway company could attach to the lands while they were

[30] *Statutes at Large*, **18**: 194.
[31] *Cong. Rec.*, 1875-76, p. 605.
[32] *Statutes at Large*, 44 Cong., 1 sess., chap. 72.

still subject to homestead entry, "ignoring the fact that the railroad grants require the lands to be withdrawn from market after the railroad companies have filed their maps," and that such withdrawal must be the first official segregation of the grant. Thus boards of directors, sitting privately in distant cities, had power to locate the general limits from within which their grants would be taken and so to acquire title to the homes of settlers.

It was asserted that the railroads used dilatory tactics, wearing the settlers out by delay. "Under a dozen pretences" they refused to take the conveyance of the land from the government, hoping thus to obtain possession by an "abandonment"—and incidentally to escape state taxation the while.

The courts could not be resorted to; for the settlers, not having title, could not bring suit.

Against such argument no very strong rebuttal was made, the contention of the negative largely consisting in the plea that this was a subject for the judiciary. (One is reminded how often that plea has been set up against reform—though we would not overlook its value as a conservative force.)

The bill passed by large majorities, the vote in the Senate standing 44 to 9 in its favor.[33]

The next important legislation on this general topic came in 1880 when settlers on restored lands who had made improvements in good faith were authorized to retain their holdings by paying $2.50 per acre.[34]

Another type of law was an act for the relief of settlers and purchasers of lands on the public domain in Nebraska and Kansas, which was passed in 1887.[35] Lands already settled had been granted to the Denver and St. Joseph railway whose title was decided by the courts to be the better. A bill was then passed by the House to return to the settlers $1.25 an acre as the price they had paid. In the Senate this amount was raised to $3.50 with the idea of covering the interest on the $1.25. Besides, the settlers had paid taxes and could not recover for them, the lands

[33] *Ibid.*, p. 690.
[34] *Cong. Rec.*, **11**: 59, 312.
[35] *Ibid.*, 1886-87, 210.

in many cases being held by third parties. The lands had been patented "at a time when government relations to railroad grants were little understood."

The bill finally passed with the Senate amendment, and $250,000 was appropriated for the payments involved.[36]

In this same year the act already referred to which provided for an adjustment of all land grants, contained important provisions concerning settlers. It provided that the entries of bona fide settlers which had been erroneously cancelled on account of any railway grant or the withdrawal of lands from market might be perfected; and, further, it authorized that erroneously issued lands, bought in good faith by settlers, might be patented to them, the railways to pay the purchase money to the government.

The period ending in 1887 closed, then, with an act to bring about the immediate adjustment of land grants; to cancel over-issued patents, etc.; and three years later all unearned grants were forfeited. At about the same time various acts were passed to protect homestead and preemption settlers and insure their interests.

Meanwhile, it must not be thought that all grants were made without considerations in the nature of services to be rendered in return. Though, as will appear in the next chapter, such stipulations were not entirely clear, they were made, and naturally their enforcement became a problem after the reaction from the land-grant policy set in.

[36] *Statutes at Large*, **24**: 550.

CHAPTER IV

THE FATE OF THE "FREE FROM ANY TOLL" CLAUSE

An entire chapter might be devoted to the attempts made by the government to get a direct return for land grants through making and enforcing stipulations concerning the transportation of troops, mails, etc. In the very early grants for canals it was customary to insert a provision to the effect that the canal should "be, and forever remain, a public highway" for the use of the government, "free from any toll or other charge whatever, for any property of the United States, or persons in their service."[1] When the railway came the same provision was made. The Illinois Central grant stipulated: "And the said railroad . . . shall be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States."[2] Later grants to the states for railways contained practically identical provisions, sometimes specifying "all tolls."

Down to the time of the Civil War no question appears to have been raised except concerning mail transportation.[3] Following that time the question of enforcing these provisions came up and was agitated throughout the next twenty years.

During the war it became a very important matter to the railways. To transport free of charge the great traffic in troops and supplies which then arose would have meant considerable sacrifice. In 1861 the secretary of war made the following statement to the president of the Illinois Central: "It has been decided by this department that the clause in your charter gives a clear

[1] *See Bul. of U. of W., Econ. and Pol. Sci. Series*, **3**: 364.

[2] *Statutes at Large*, **9**: 466, s. 4.

[3] Below, p. 203. The mails were to be transported at such price as Congress might direct, the postmaster general meanwhile determining it.

right to . . . the use of your roadway, without compensation . . . As a proper compensation for motive power, cars, and all other facilities incident to transportation, two cents per mile will be allowed for passenger travel, subject to a discount of thirty-three and a third per cent, as due to government for charter privileges.'' A reasonable charge for freight would be allowed, subject to a similar discount.

In 1865 the matter of exacting free transportation was agitated in Congress;[4] but no action was taken and settlements continued to be made on the above basis for nearly a decade. The chief reason for this course was the feeling that the various land-grant railways, except the Illinois Central, would be bankrupted by requiring free transportation.

But in 1866 the land-grant acts began to specify in more definite terms the free transportation of government property.

Things came to a crisis in the Seventies. In 1874 Congress determined to enforce the law as it understood it, and an act was passed which declared that no part of the army appropriation should be paid ''to any railroad company for the transportation of any property or troops of the United States over any railroad which . . . was constructed by the aid of a grant of public land, on the condition that such railroad should be a public highway for the use of the Government of the United States, free from toll or other charge, or upon any other conditions for the use of such road for such transportation,'' nor was any allowance to be made for the transportation of army officers on duty.[5] The law authorized suits to recover payment so withheld. The next year a deficiency appropriation act contained a similar provision, only it was not to apply during the current year, and not at all to roads concerning which the sole condition was that they should not charge the government higher rates than they did individuals.

These laws were put to the test almost at once. The circuit courts decided in favor of the government; but upon appeal

[4] *Cong. Globe*, 38 Cong., 2 sess., pp. 890, 1387. The House passed a provision requiring free transportation, but the Senate finally rejected it and induced the House to accept.

[5] *Statutes at Large*, **18**: 74.

their decision was reversed in 1876 when the supreme court handed down its opinion in the cases of the Lake Superior and Mississippi Railroad Co., and the Atchison, Topeka, and Santa Fe Railroad Co. vs. the United States.[6] The court began by stating that the question had arisen whether by the reservations alluded to above the free use of the road alone was meant or transportation also. The companies claimed that if they gave the government the free use of their roads, including track, terminals, etc., it was all that was required of them; the government claimed to be entitled to free transportation on the roads. "We are of opinion," said the court, "that the reservation in question secures to the government only a free use of the railroads concerned, and that it does not entitle the government to have troops or property transported by the companies over their respective roads free of charge for transporting the same." Accordingly there was awarded to each road "compensation for all transportation, performed by them respectively, of troops and property of the government (excepting the mails), subject to a fair deduction for the use of their respective railroads."

The court made much of the early distinction between toll and transportation charges, and the correlative belief that the railroad was to be similar to a canal or turnpike in that anyone might place one's vehicle on the rails and supply one's own motive power. It held that Congress in making the stipulations concerning tolls had in mind the mere use of the road as a public highway.

The logic of the opinion is questionable. Long before 1850, the idea of a practical distinction between toll owner and transportation agent had ceased. The idea that a railroad company is not necessarily a transportation company, when applied as a practical rule of action, seems either sophistry or anachronism. In the debates of 1865 Senator Wilson said, "I take it that when we made this bargain it was expected by the whole country that these railroads would carry our munitions of war and our troops; and if the Army had remained as we then had it, . . . they

[6] 3 *Otto*, 442.

would have performed the work and nothing would have been said about it.''[7]

The reasonable assumption is that Congress, if it meant anything in the way of securing a return for the lands granted, meant free transportation. In the grants to canals it was impossible to stipulate free transportation, but freedom from tolls was exacted. Probably little importance was attached to the provision in the railway grants,—certainly not the importance it later gained,—and words similar to those of the earlier grants were inserted. The questions that later arose were not foreseen. When they did arise, however, the interpretation should have been based upon the intent of Congress.

The words of the acts did not render this unreasonable; the effect was rather to the contrary. ''Free from all toll or other charge upon (or 'for') the *transportation*'' of government property, ran the acts. There seems to be no good reason for fixing attention upon the public-highway idea to the exclusion of the charge for transportation.

In a word, the intent was there, and the letter did not prevent.

But there was the decision, and under it the question was narrowed to the one covering the deduction to be made from usual rates. What allowance was the railway to make in return for its privilege of being a public highway? Meanwhile the secretary of war was reporting the embarrassments which attended the situation, that department not being able legally to compensate land-grant roads without a suit. A repeal of the prohibitory acts was recommended.[8]

In the Army appropriation bill for the year ending June 30, 1882, the following provision was made for transportation on land-grant railways:[9]

[7] *Cong. Globe,* 1864–65, p. 893. Senator Howard made this statement: "When this statute was passed, undoubtedly it was in the mind of Congress . . . that this transportation . . . should be carried on and perfected by the respective companies themselves. . . . I venture the surmise that had the idea been started in discussion at the time this law was under discussion in Congress, that the whole privilege thus granted to the United States was to employ their own cars upon the roads that might be constructed by these land grants . . . these statutes would never have been passed." (*Ibid.,* p. 892.)

[8] See *Sen. Rep.,* 1880–81, no. 899, p. 23.

[9] *Statutes at Large,* 21 : 348.

"For the payment for Army transportation lawfully due such land-grant railroads as have not received aid in government bonds, to be adjusted by the proper accounting officers in accordance with the decisions of the supreme court in cases decided under such land-grant acts, but in no case shall more than fifty per cent. of the full amount of the service be paid until a final judicial decision shall be had in respect of each case in dispute, $125,000: *Provided,* That such payment shall be accepted in full of all demands for said service."

Similar provision was made the following year, save that the compensation was to be computed on the basis of rates charged the public at large; and it was further provided that all land-grant roads which filed written acceptance of those terms and of such sums in full payment should have their accounts for past services audited and paid in this manner. Further services were to be paid for on this basis, and all laws inconsistent therewith were declared repealed.[10]

One hundred and twenty-five thousand dollars was again the amount appropriated. Such appropriations continued to be made, but by the end of the period were reduced to $50,000.

Thus Congress failed in carrying out any intent it may have had for securing free government transportation; but to this day land-grant railways receive more or less reduced rates on such transportation.

Let us now turn to the one remaining phase of government aid to railways which demands separate attention.

[10] *Ibid.,* **22**: 128, (1882).

CHAPTER V

IMPORT DUTIES AND RAILWAY IRON

The second half of the century opened with the tariff of 1846 in force. By that act an ad valorem duty of 30 per cent. was imposed on imports of railway iron.

Between 1840 and 1850 there had been great development in the iron industry both in supply and demand, the latter showing the greater increase. In 1840 there were 286,000 tons of pig iron produced in the United States; in 1850, 564,000 tons, while the output of iron rails equalled 44,000 tons. The results of using coal in smelting were only beginning to be realized. On the other hand, railway mileage was growing by leaps and bounds, increasing from 3,535 miles to 9,021 miles during the decade preceding 1851. During the year ending June 30, 1851, 188,625 tons of railway iron were imported; in 1854, over 282,000 tons. In the same two years the duty amounted to $1,470,436 and $3,606,093, respectively.[1] Clearly the domestic supply was entirely inadequate, and the 30 per cent. duty was felt as a hardship by railway interests. The old struggle[2] between rail producers and rail consumers was actively continued.

During 1848–49 there was a brief depression in this country, and railway building was slightly checked. The price of iron also fell and many mills were closed. This was caused, in part, at least, by European conditions. During 1845, 1846, and 1847, railway construction had boomed abroad and large orders for rails were placed with English manufacturers. Then, during the revolution of 1848, these orders were cancelled and an over supply confronted English producers. As a result rails were sold in America at so low a price as to forbid competition.

[1] See *Sen. Misc.*, 1854-55, no. 9.

[2] *Bul. of U. of W., Econ. and Pol. Sci. Series*, Vol. 3, Chaps. XI, XII; reprint, vol. I, *ibid.*

This situation made the Pennsylvania iron masters the more loath to listen to reductions of duties on railway iron, lent weight to their arguments for protection, and must be borne in mind in approaching the situation at the opening of our period.

Typical of the situation were various attempts to secure the passage of bills extending credit for duties on imported rails.[5] In 1853, for example, when the civil and diplomatic bill was up, an amendment was introduced to the effect that credit be advanced for five years to all railways for duties on railway iron imported and actually laid down, the railways to pay 6 per cent. interest on the amount. Mr. Brodhead (Pa.) was at once on his feet. He could not see why the tariff of 1846 should be tampered with for the benefit of corporations. It would be particular legislation: why discriminate in favor of railway corporations as against the former. When asked why iron producers should be favored over other interests he dodged behind the fact that few iron producers were incorporated. He also emphasized the amount of credit proposed, estimating it at from ten to fifteen million dollars per year. The amendment was withdrawn; but Mr. Mason (Va.) introduced one for a general repeal of duties, and Mr. Douglas (Ill.) spoke in favor of suspending duties for two or three years. The existence of a surplus revenue was advanced in favor of such action. It was voted down, 19 to 36.[6]

During the next two years the movement for a modification of duties on railway iron reached its climax. When, at the 1853–54 session, the Senate considered a bill for allowing a credit, for a limited time, on imports of such iron, Mr. Douglas at once moved as a substitute the temporary suspension of duties until 1857, and the discussion chiefly centered around this proposition. The two great points made in its favor were: (1) the treasury surplus, (2) the increased price of iron. Two years previously rails had sold for from $40 to $50 a ton; now the price had reached $70 to $80, and this made the demand for lower import duties very strong.[7]

[5] *Cong. Globe*, 1850-51, p. 625.

[6] *Ibid.*, p. 936.

[7] See also discussion of similar measure in the House, *Cong. Globe*, 1853-54, p. 71.

Indeed, it was just at this time that the railways got together and organized to bring pressure to bear upon Congress, in connection with which movement the name of Azariah Boody goes down in congressional history. Mr. John Letcher (Va.) made the exposé in the House. His remarks are interesting. "It has become very fashionable in these last days of improvement to hire agents, and organize committees, to be charged with the particular business of boring Congress, and engineering railroad and other schemes through this House. (Laughter.) The grants of alternate sections of land . . . seem to have had no other effect than to excite a desire for further favors. They have, I see, under the direction of a gentleman who bears the euphonious name of Azariah Boody (and who, I understand, was elected a member of this Congress, but, having a better speculation in hand, resigned), organized a committee to engineer through Congress a bill for the remission or suspension of duties on railroad iron."[8] This committee circularized the railways of the country for information concerning their mileage to be constructed, etc., and requested each to contribute $100 toward meeting the expenses to be incurred in getting the desired legislation. Many railways acted in accordance. S. F. Vinton,- Noah L. Wilson, John Stryker, Geo. Ashmun, and Henry V. Poor were the signatures.

It is significant to observe that the first clear evidence of the existence of an organized railway lobby was found in connection with this same subject.[9]

In objecting to the Douglas substitute, Mr. Seward (N. Y.) made a strong speech. The burden of his argument was the disturbance to industry which would result from a suspension of duties, though he also sounded a note of warning against too great haste in reducing revenues. To suspend duties would leave doubt as to the final outcome and in the suspense iron manufactures would be paralyzed.[10]

At the 1854–55 session, on motion by Mr. Jones (Tenn.) the

[8] *Ibid.*, 1853-54, Append., p. 873. Boody was said to be interested as contractor to the amount of from six to eight million dollars in the construction of the Wabash Valley railroad. See also, Pt. I, p. 983.

[9] *Bul. of U. of W., Econ. and Pol. Sci. Series*, 3: 312, reprint, vol. I, p. 146.

[10] *Cong. Globe*, 1853-54, p. 886.

Senate proceeded to consider a bill granting to railway companies three years in which to pay the duties on iron imported for railway purposes. The committee on finance had reported adversely on the bill and the question was on concurring in the report. The arguments for the bill centered around the points that railway interests were unduly taxed in favor of the iron manufacturers, and that iron interests would be little injured, and even might be benefited by its operation. By continuing the existing duty a thousand miles of railway were annually prevented, and, as a result, the demand for some $5,300,000 worth of other kinds of railway iron was cut off. Mr. Jones maintained that the aggregate iron interests would be benefited by giving such relief to the railways as would enable them to continue building and so furnish a demand for miscellaneous iron products to the value of $5,300,000.

There was also much discussion of the effect of the policy upon the tariff system and much objection was made by protectionists, but in the end the "judicious protection" advocates won and the bill passed the Senate by a vote of 25 to 18.

In the House a clause similar to that passed by the Senate was introduced into the civil and diplomatic bill; but, after considerable debate, was rejected.[11]

The failure of the preceding measures may be taken as marking the end of the all but successful movement in behalf of suspension or remission of duties on railway iron which took place just prior to 1857. Bills were introduced at the 1855–56[12] and 1856–57[13] sessions, but made little headway.

It will have been observed that the various measures proposed vary all the way from a repeal of duties on railway iron to a mere extension of credit for a few years, a half-way plan being to suspend duties for a certain period. The last plan was perhaps the most objectionable of the three, for the reasons stated by Mr. Seward.

The final repeal of duties was politically quite impossible. It does not fall within our province to discuss the wisdom of the

[11] *Ibid.*, p. 910 ff.
[12] *Ibid.*, pp. 473, 655.
[13] *Ibid.*, pp. 220, 581. A proposition to make 8 yr. mail contracts, the railways to carry the mails free in return for free railway iron.

tariff on iron; but, while recognizing the desirability of stimulating so important an industry, even at considerable cost, it seems clear that the development of transportation facilities was equally or surpassingly important. And, furthermore, a close connection between the tariff and the growth of the iron industry was not apparent. In 1856 the iron producers had had thirteen years of protection, yet they were probably less able to supply the demands of the nation for railway iron than they were in 1846. However that may be, the iron producing interests were clearly ascendant and no concessions were made.

Naturally iron interests made least objection to a mere extension of credit, and, as no diminution of duties was involved, protectionists could consistently support such a measure. Accordingly the bill which passed the Senate simply extended three years' credit. Assuming its efficient and rigid administration, such a law would have been fairly well adapted to meet the needs of the time. By its operation railway companies might have gotten under way before being called upon to pay duties, and have profited by the lower price of imported rails. But history shows that the government is not fortunate in the role of creditor, and such an act would probably have involved agitation, litigation, and loss. It is certain that had importation of railway iron and railway construction been encouraged in this way the crisis of 1857 would have been even more severe, and the bad debts of the government numerous.

In the debates of the period one of the most noticeable features is the clash of interests between the new and the old states. The older states were fairly well supplied with transportation facilities and were at most relatively indifferent. Within their bounds lay the only important iron manufactures. On the other hand, in the West and South the demand for railways was strong and these economically new states stood solidly for some concession in duties on railway iron. The rapid expansion of the United States has led to the continuous existence of a sectionalism based upon the difference between the interests of an old, developed community and those of a young and undeveloped one. This sectionalism, a thing entirely apart from that due to different natural environments within a nation of uniform economic development, lies back of many of our problems.

The situation is well put in a memorial from a convention held at Richmond, Va., in December, 1854: "The policy of admitting railroad iron free of duty, in the infancy of such enterprises, will not be disputed. It is only contended by your memorialists that the policy was abandoned before the reasons which suggested it ceased to exist; that the railroad system has not yet been sufficiently extended to secure the great objects which entitled it to your most favorable consideration."[14]

Of a like tenor were petitions from Iowa,[15] Alabama, and Tennessee.[16] "In common with many of the southern and western states, we are extensively engaged in constructing railroads" and why may we not have advantage of free railway iron as did the older states in building their railways?

The old states, especially the iron producing ones, were able not only to prevent such advantages, but also to secure provisions in the charter of railways incorporated by Congress that only American rails should be used. The various Pacific railway acts passed during the sixties did so.[17]

A distinct feature of the preceding agitation concerning imports of railway iron is the existence of several proposals to connect free railway iron with free mail service.[18]

In 1857 came the crisis of that date and shortly thereafter the Civil War. During this period railroad building was checked and the surplus in the treasury ceased to exist, so that two factors making for free railway iron were withdrawn. In fact, duties were raised on that article as in the case of all others. The Morrill Act of 1861 laid a specific duty of $12 per ton on iron rails, and a 30 per cent. ad valorem duty on rails of steel. Three years later these rates were raised, imports of iron rails being charged $14 a ton, and steel rails 45 per cent. ad valorem.

[14] *Sen. Misc.*, 1854-55, no. 9.

[15] *Ibid.*, 1856-57, no. 33.

[16] *Ibid.*, 1855-56, no. 21.

[17] The provision found in the Texas Pacific charter is typical: "That said road shall be constructed of iron or steel rails manufactured from American ore, except such as may have heretofore been contracted for by any railroad company which may be purchased or consolidated with by the company hereby incorporated." (S. 16.)

[18] See above, p. 204.

The $14 duty on iron rails remained in force until 1883; but, beginning in 1870, there were several fluctuations in the duty placed upon steel rails. From 1870 on comes a second period of agitation for modification of duties on "railway iron," the steel rail occupying the center of the stage.

By 1870 the Bessemer process for converting iron into steel—introduced in this country about 1867—had begun to figure in the supply of rails. In that same year a tax bill passed Congress in which was a clause fixing the duty on steel rails at 1¼ cents a pound or about $28 a ton. No opportunity was given for a separate vote upon this clause.

At the next session the following resolution was offered:[19] "Whereas the improvement in the manufacture of railway iron by the Bessemer or pneumatic process has been such that steel railway bars can now be purchased in this country at an increase of cost of about 20 per cent. over the cost of iron rails; and whereas . . . the proportionate duty on steel rails ought not now . . . to exceed $20 per ton; and whereas this House . . . passed a tax bill . . . fixing the tariff on steel rails . . . at $27.88 per ton; and whereas a tariff so disproportionate to the cost of the article is calculated to prevent the introduction of better rails, to limit the extension of railways . . . and to diminish the revenue to be derived from this source . . . :" therefore, resolved that a bill be brought in fixing the tariff at not over $20 per ton.

Some concession was made to this movement in 1872 when the duty on steel rails was reduced to $25.20 a ton. Three years later, however, record is found of numerous petitions from manufacturers and workers in steel for a specific duty of one cent per pound and in 1875, the rate was again put at $28. Here it stayed until 1883, when it dropped to $17 and remained there during the rest of our period.

One interesting and prominent feature of the discussions on this general subject is the attention paid to labor. For example, Mr. Killinger (Pa.) made a memorial of Pennsylvania iron-workers the occasion for a plea for protection: after eloquently championing them as men whose hands were brown with honest

[19] *Cong. Globe*, 1870-71, p. 175. Not adopted.

toil and whose brows were moist with the sweat of honest labor; he maintained that their interests were as important as the "hired emissaries of British free trade and the paid agents of importers and monopolists."[20]

References to the interests of labor begin much earlier. In 1854 one argument advanced in favor of extending credit to railways was that it is the duty of government not to throw obstacles in the way of labor, but, by all fair means, to offer facilities for the working man. And not a few similar cases might be cited. These earlier references, however, do not give evidence of an organized labor propagandum, and of demagogic appeals to it, as in the case in the Seventies.

With this chapter on import duties and railway iron, the subject of pure congressional aid to railways may be dismissed, although other aid aspects are interwoven throughout the following chapters on Pacific railways. The relatively small proportion of space devoted to the preceding topics makes a sharp contrast between this volume and the one devoted to the period before 1850.

[20] *Ibid.*, 1871-72, p. 802.

BOOK II

PACIFIC RAILWAYS

CHAPTER VI

FINAL DEVELOPMENT AND PASSAGE OF THE PACIFIC RAILWAY BILL: 1850–1862

The second half of the nineteenth century opened with two main points concerning a Pacific railway still at issue: what should be the route followed, and who should build it. The latter point, however, was soon to be settled in favor of private enterprise, assistance being furnished by the government. Propositions for a great national railway soon practically ceased and within two years the Whitney plan, which was all but national in its essence, appeared for the last time. Resolutions passed by the legislature of California and presented by Mr. Gwin of that state constitute one of the latest expressions favoring a purely national way.[1]

The Whitney Bill: 1851–52

In 1852 the House committee on roads and canals introduced a bill on the plan proposed by Asa Whitney and recommended it for passage holding it to be "the only constitutional plan for the accomplishment of this vastly important work perhaps for ages to come."[2] Very briefly, the bill proposed to sell to Whitney a strip of land sixty miles wide from Lake Michigan or the Mississippi river to the Pacific, for which he would pay ten cents an acre upon the completion of the road. Whitney would get his funds from the sale and settlement of the lands as he progressed. Rates would be made on a cost basis and the mails be carried free of charge.[3] The friends of the bill were able to make little progress.

[1] *Cong. Globe*, 1850-51, p. 132.

[2] *Rep. of Com.*, 1851-52, no. 101.

[3] For details of the bill see *ibid.*; or *Bul. of U. of W., Econ. and Pol. Sci. Series* 3: 409; reprint, vol. I, p. 243.

The committee admitted that there were a few persons who desired the government to undertake the work, but stated their belief that this would never be sanctioned by Congress or the people.

In the Senate, Mr. Rusk (Tex.) of the committee on post office and post roads reported a modified Whitney bill, the modification consisting in a second route to extend from a point on the Mississippi north of Memphis via the Rio del Norte to San Diego or San Francisco.[4] The proposed beneficiaries in the case of the second route were S. L. Seldon, R. T. Scott, and associates. Mr. Gwin gave notice that when the bill came up he would move to strike out the name of Asa Whitney and of every other individual named in it. It was not brought up again.

Growing Prominence of the Southern Route

At about this time Mr. Freeman (Miss.) of the House committee on public lands argued for a so-called Atlantic and Pacific railroad, bringing the matter up in connection with a proposed land grant to Mississippi.[5] West of the Mississippi the road would extend from Vicksburg to Shreveport and thence via El Paso del Norte to San Diego. By making a grant of land to the states and territories to be traversed Congress would "not only perform a bounden duty to those infant republics, but avoid the objection of establishing a system of internal improvements by the Federal government." This measure came to nothing.

One gets the impression that at this time the southern interests with their arguments for a southern route and in opposition to Whitney's plan were most active in Congress.[6]

Of such a tenor were memorials from the territory of New Mexico[7] and a railway convention held at Little Rock, Ark., on July 4, 1852. The letter stated that it was universally conceded that the work was too great for private initiative unless a reasonable profit were guaranteed; and proposed a plan according

[4] *Cong. Globe*, 1851-52, p. 941.
[5] *Ibid.*, p. 1271, append., 9286.
[6] *See e. g.*, speech by Howard (Tex.) in *Cong. Globe*, 1851-52, p. 776.
[7] *Sen. Misc.*, 1852-53, no. 36.

to which the federal government would guarantee 5 per cent., on the cost, a maximum sum being stipulated.[8]

Pacific Railway Bills in 1853; Appropriation for Survey

The debates of 1853 were characterized by a crystalization of conservative and constitutional objections, while the probable necessity for a grant of funds, supplementing or replacing lands, was more clearly seen.

A bill "authorizing the construction of a railroad and branches; for establishing a certain postal communication between the shores of the Pacific and Atlantic, within the United States; for the protection and facilities of travel and commerce, and for the necessary defense of the country" was introduced by Senator Gwin. This bill, which was a rather immense attempt to satisfy all the conflicting sectional interests, provided for a main line from Fulton, Ark., to San Francisco with branches to Dubuque (or Chicago), St. Louis, Memphis, New Orleans, and Matagorda; and an Oregon branch was to extend northward from California.

Funds were to be provided through a land grant of alternate sections twenty miles on each side in California and the territories, the construction to be carried on by contractors in the territories and by the states. By a later amendment, in Texas, where there were no public lands, $12,000 a mile was to be paid. If any state should not undertake its part of the construction of the road before the end of one year, the president, for the federal government, should—with the state's consent—construct the road, as in the territories.

The chief objections raised against this bill were the greatness of the project—its "magnificence,"—and its unconstitutionality. Moreover, Mr. Brooke (Miss.) and others believed the road could not be built from a land grant alone and proposed a substitute which authorized the secretary of the treasury to prepare $30,000,000 of interest bearing "Atlantic and Pacific Post-road stock," to be turned over to a properly organized and incorpor-

[8] *Ibid.*, no. 5.

ated company in instalments as the road was constructed.[9] The route would be determined by the company and was not to pass through any state without its consent, but any state which refused consent would be denied the benefit of any grant of lands thereafter. Various concessions and privileges were to be enjoyed by the United States in return, and the right to purchase the road after twenty years was reserved. This company appears to be the same as the Atlantic and Pacific railroad, referred to above in connection with the prominence of southern routes, and a New York corporation. It probably made more progress toward the organization and financing of a Pacific railway company than had been made before this time; and, in 1853, in spite of a money stringency, the sum of $12,800,000 was subscribed by Robt. J. Walker, Dr. Newcomb, and others.[10]

The substitute was objected to as creating a vast private monopoly and as being without sufficient safeguards for the government, and it was not accepted.

Sectional interest was more directly aroused by the amendment offered by Mr. Chase (O.) to the effect that the railway should be built on the most direct and feasible route between San Francisco and some point on the Missouri not above Kanesville, Ia., nor below Independence, Mo.;[11] and another by Mr. Bell (Tenn.) which indirectly favored a southern route.[12] Neither was carried.

Finally, a Senate select committee having been appointed to take under consideration the whole subject, it reported the so-called Rusk bill, being a modification of the Gwin bill, and this Rusk bill was made the special order. As Mr. Geyer put it, the committee had before it various plans: "One of them . . . looked toward the construction of this road out of the National Treasury, under the superintendence of the National Government; another proposed to make a road by the intervention of

[9] *Cong. Globe*, 1852-53, p. 314. It will be observed that a grant of money would probably profit the builders of a road more and more according to its shortness and so would lead a company to choose the southern route while a land grant would, other things being equal, have the opposite result.

[10] *Hunt's Merchants' Mag.*, **29**: 462 (1853).

[11] See *ibid.*, p. 420.

[12] *Ibid.*, p. 341.

a private company, to whom was to be granted a bonus in money; and still another proposed to make a road entirely out of the public lands. The committee has reconciled these difficulties by the proposition now before the Senate.''[13] The modifications, all of which looked toward appeasing the hostility of different objecting elements, were as follows: (1) after a preliminary survey by government engineers, the route would be located by the president; (2) he would also let contracts for its construction to the lowest bidder, the contractors to form a corporation, ''The Pacific Railroad and Telegraph Company'' by name; (3) the land grant was decreased, being alternate sections six miles on each side in the states, and double that width in the territories; (4) United States 5 per cent. fifty-year bonds were to be issued to the amount of $20,000,000 and paid to the contractors as the work progressed; (5) there was no provision for particular branch lines. Transportation and telegraph service were to be furnished to the government free of charge; and it was provided that after thirty years the government might buy the road. The consent of the states involved was made necessary as a prerequisite to construction.

In a word, a preliminary survey was to be required, funds in addition to land were to be granted, the road was to be built by private activity, and the rights of the states were observed.

Yet this measure seems to have given little more satisfaction than its predecessors. Mr. Mason (Va.) declared it a ''rape on the Constitution;'' enlarged upon the great powers granted to the executive; and denied the right of Congress to appropriate for internal improvements.[14] Mr. Cooper (Pa.) objected to the extent of the powers granted to the corporation, but his remarks show he was not overly familiar with the provisions of the bill.[15] And Mr. Toucey (Conn.), like Mr. Mason, expressed extreme states' rights opposition.

In the attempt to make the bill acceptable, amendments forbidding a contract for more than the amount authorized, and providing that Congress might restrict, alter, or amend the

[13] *Ibid.*, append., p. 186.
[14] *Ibid.*, p. 676.
[15] *Ibid.*, append., p. 183.

charter were adopted; and another practically forbade the expenditure of the $20,000,000 bond issue within the states. This last provision went too far, and the Senate adjourned without final action.

The common-sense, conservative belief that the first thing to do was to make adequate preliminary surveys of definite routes gained ground during this session, and it was along this line that substantial action was taken. The Senate having under consideration the bill from the House making appropriations for the support of the army for the year ending June 30, 1854, added an amendment which provided that the secretary of war might make explorations and surveys for determining the most practicable and economical route between the Mississippi and the Pacific, and appropriated $150,000 to that end.[16] The vote stood 31 to 16 in its favor. This provision was accepted by the House by a vote of 82 to 42 and became law, thus being the first appropriation made for actual steps toward a Pacific railway. A similar amendment had been made to the Army Appropriation bill in 1849, but, as Mr. Chase said, it was allowed to pass into the general fund and was never used for the object designated.[17]

The objections raised even to this appropriation for a survey were not few.[18] On the one hand Mr. Gwin was inclined to oppose such action on the ground that it would inflame sectional opposition without accomplishing anything. Mr. Hunter feared the beginning of a system which would swamp appropriation

[16] *Statutes at Large*, 32 Cong., 2 Sess., c. 98, s. 10: "And be it further enacted, That the Secretary of War be and he is hereby authorized, under the direction of the President of the United States to employ such portion of the corps of topographical engineers, and such other persons as he may deem necessary, to make such explorations and surveys as he may deem advisable, to ascertain the most practicable and economical route for a railroad from the Mississippi River to the Pacific Ocean, and that the sum of $150,000 or so much thereof as may be necessary, be and the same is hereby appropriated, to defray the expense of such explorations and surveys.

s. 11. And be it further enacted, That the engineers and other persons employed in said explorations and surveys shall be organized in as many distinct corps as there are routes to be surveyed, and their several reports shall be laid before Congress on or before the first Monday in February, 1854."

[17] *Cong. Rec.*, 1852-53, p. 315. Record of this appropriation is found in the *Statutes at Large*, 9: 372.

[18] See *ibid.*, pp. 799, 815, 996.

bills; while Mr. Bell saw in it the first insidious step toward a permanent system of internal improvements, and he compared it with the Survey Bill of 1824.[19] And Mr. Dean, in the House, argued that if Congress could make a survey in a state without its consent, the Federal government could construct a railway, an act which he held would be unconstitutional.[20]

In the House an attempt was made to amend the survey provision by providing for the construction of a Pacific railway.

Pacific Railway Bills: 1853–54

No action was taken at the first session of the thirty-third Congress, though bills for Pacific railways were introduced in both houses.[21] A prominent feature was the avowed object of minimizing sectional and constitutional objections.

It is clear from the debates that, in addition to the usual reasons, two more temporary forces worked for a Pacific railway. One was the president's message, which asked the early attention of Congress to the subject and argued that government aid would be constitutional. The propitious state of national finance was another,—Mr. Gwin referring to the annual accumulations of the overflowing treasury as an embarrassment.

In the House two routes[22] were proposed, one to extend from a point on the Mississippi river not north of the thirty-seventh parallel, the other from Lake Superior or the Mississippi river in Minnesota. There can be little doubt that the inclusion of the northern route was largely due to a desire to divert attention from the "central" route; though it should be remembered that the surveys of the northern route were being favorably reported, and the population of Minnesota and Oregon was growing rapidly. This motive was charged by Mr. Davis (Ind.). Naturally the opposition of representatives from New York, Ohio, and Indiana was aroused.[23]

[19] See *Bul. of U. of W., Econ. and Pol. Sci. Series*, 3: 275; reprint, vol. I. p. 109.

[20] These fears were justified, for at the next session Mr. Davis argued in the House that the passage of the appropriation bill was evidence to the constitutionality of constructing a Pacific railway.

[21] *Cong. Globe*, 1853-54, pp. 119, 127.

[22] *Ibid.*, pp. 38, 42.

[23] For debate see *ibid.*, append., pp. 881, 961 ff.

Pacific Railway Bills: 1855—Bill Passes Senate

In February, 1855, Jefferson Davis, as secretary of war, submitted to Congress the results of surveys and explorations made under the appropriation act of 1853. Of the five routes examined, he recommended that of the thirty-second parallel as the most practicable and economical.[24] The recommendation of the southern statesman was properly discounted and the reports of survey seem to have been chiefly effective in convincing men that there were several practicable routes to the Pacific.

Meanwhile a Senate select committee of nine had been considering a bill which had failed to make headway during the preceding year, together with a substitute offered by Mr. Gwin.[25] This substitute, which was agreed to by a vote of 24 to 14 and finally passed the Senate by a vote of 24 to 21, provided for three roads each to be aided by a grant of public lands to the extent of alternate sections twelve miles on each side of its line. Bids were to be advertised for, and were to state (1) the time required for construction, (2) the day on which the road would be surrendered free of cost to the United States, (3) the rate for mail service—not to exceed $300 per mile,—and for other government service. The contractors were to determine the termini and definite line of route. They must deposit $500,000 in bonds for security, and in case of failure to carry out the contract the road would be forfeited to the United States. When the roads were surrendered to the United States, such parts as lay within states were to be given over to them.

This bill was attacked as incurring too great an expense. It was stated that it would not only be well nigh impossible to procure rails, but that the three roads would make such a demand for labor and supplies as to raise their price. It was still objected that not enough was known concerning the routes, and the enormous amount of land and difficulty in extinguishing Indian titles were other points. Mr. Mason argued that all bids

[24] In his annual report, Dec. 1855, (*Sen. Docs.*, 1854-55, no. 78. vol. VII) Mr Davis also called attention to the route of the 35th parallel.

[25] See *Cong. Globe*, 1854-55, p. 747 seq.

should be submitted to Congress and proposed an amendment to that effect which was rejected by a vote of 26 to 21.

Mr. Seward summed up in a few words the reasons for favoring the bill. "There never will be a time again in this country," he said, "when it will be so rich, and when its treasury will be so full. There will never be a time when there will be more information before the public in regard to the practicability of such a road. There will never be a time again when embarrassments, resulting from the diversity of interest in regard to the location of the road, will be less than they are now. If, then, we are ever to build a road, this seems to me just exactly the time."

The House, whose select committee of thirteen had held conference with the Senate committee, had under consideration a bill which was practically indentical with the Senate bill. Some members, as good Democrats, objected to giving one foot of public land. Others professed to believe the whole scheme a speculation. It was argued that floods of immigrants would be necessary to furnish labor and the antipathies of the Know-nothing party on this score were appealed to. The chief struggle centered around the substitution of one central route to San Francisco for the three lines proposed, and, after several amendments to this effect had been lost, one by Mr. Davis was carried. With this amendment the bill was passed, 109 to 97. Later the action was reconsidered and the bill recommitted to the select committee by a vote of 105 to 91.

The bill which passed the Senate was not acted upon.

One of the most interesting features of the House debate was the speech of Thomas H. Benton, which is significant as indicating an entirely changed attitude toward government participation.[26] Benton stated that the settlement of the country and the growth of states and territories had made private enterprise preferable. He had found solid capitalists ready to undertake the work without subsidy; and he scouted the idea of paying for the use of a road built at government expense, and of bargaining with corporations which always cheated the government.

[26] *Cong. Globe*, 1854-55, append., p. 73 seq. For Benton's earlier views, see *Bul. of U. of W., Econ. and Pol. Sci. Series*, 3: 427; reprint, vol. I, p. 261.

Pacific Railway Bills: 1855–57; Relative Inactivity

At the next Congress no measure passed either branch of the national legislature, though several bills were introduced. Prominent among these was one reported during the first session by the Senate select committee,[27] the chief provisions of which were: a land grant of alternate sections twelve miles on each side; contract to be let by bid; contractors to be entitled to $2,500,000 in United States six per cent. bonds upon completion of one hundred miles, to be repaid within fifteen years after the completion of the road; deposit of security required and the government to have a lien until the bond subsidy should be repaid. This bill was laid on the table by a vote of 25 to 23.

It was during this 1856–57 session that Mr. Gwin made an attempt to push through the Senate the same bill which was passed by that body in 1855. The attempt, however, proved vain, and the bill was laid on the table.[28] This episode well illustrates the relative inactivity of Congress with regard to Pacific railways, an inactivity due largely to the decline of the Whigs' power and the heat of the Kansas struggle.[29]

Renewed Activity in Pacific Railway Discussion: 1858

In the campaign of 1856 both the Republican and Democratic party platforms contained Pacific railway planks. The Democrats, who were to have the majority in Congress, worded theirs as follows: "Resolved, that the Democratic party recognizes the great importance, in a political and commercial point of view, of a safe and speedy communication through our own territory between the Atlantic and Pacific coasts, . . . and it is the duty of the Federal government to exercise all its constitutional power to the attainment of that object, thereby binding the Union of these States in indissoluble bonds, and opening to

[27] *Cong. Globe*, 1855-56, p. 962 (Sen. no. 186). For other bills see *ibid.*, pp. 596; 487, 2188; *Repts. of Com.*, 1855-56, no. 324, and 1856-57, no. 264.

[28] *Cong. Globe*, 1856-57, p. 776. For other bills see pp. 141, and 318.

[29] There was a minority report attacking the reliability of the Pacific railway surveys and report of the secretary of war, which was answered by the secretary and provoked a further reply.

the rich commerce of Asia an overland transit. . . . " The Republican plank was more imperative.

In his annual message communicated to Congress in December, 1857, President Buchanan argued strongly for a Pacific railway. Military expediency was the burden of his argument. "Without such a road it is quite evident we cannot 'protect' California and our Pacific possessions 'against invasion,' " was his conclusion. He also referred to the mail service and general commercial development as furnishing auxiliary arguments. But the constitutionality of government aid to the undertaking rested upon the power to raise and support armies.

In the Senate Mr. Gwin at once got a resolution passed which referred this part of the president's message to a select committee of nine,[30] and a bill (no. 65) authorizing the president to contract for the transportation of mails, troops, etc., by railroad from the Missouri to San Francisco was introduced.[31] Briefly the substance of this bill follows. Bids were to be asked for, which must state what amount would be completed each year, when the road would be surrendered to the government, and at what rate, not to exceed $500 a year, the mails would be carried. A deposit of $500,000 or bonds to that amount must be made to guarantee the execution of the contract. The aid proposed consisted in both land and a loan of credit. The amount of land was twenty sections to the mile, to be located on each side of the road. The credit, in the shape of nineteen-year 5 per cent. United States bonds, was to equal the sum of $12,500 per mile, but not to exceed a total of $25,000,000. These bonds were to be repaid by transportation service. Upon surrender to the government the road was to be turned over to the states. The gauge of the road was to be six feet. The eastern terminus would have lain on the Missouri river between the mouths of the Big Sioux and the Kansas.

The bill was finally postponed.

In objecting to the bill Mr. Brown (Miss.) stated that he thought existing companies of proven ability ought to be entrusted with the work. Most prominent among the negative

[30] *Cong. Globe*, 1857-58, p. 61.
[31] *Ibid.*, p. 329.

arguments, however, seems that based upon the unprofitableness of railways. It was urged that railway capital was relatively unremunerative, and that where there was little way or local traffic this was especially true. The Pacific road would have to depend on through traffic. Such reasoning, of course, had its strongest application against the proposed amendments for two or three lines. This was the time of the crisis of 1857 and existing economic conditions made a background unfavorable for such legislation. Mr. Mason could argue with much force that inasmuch as land grants had stimulated reckless railway construction they had been at the bottom of the crisis.

The House, after much difficulty arising from fear of sectional preference, referred the subject to a select committee of fifteen and proceeded to wrangle over routes.[32]

Senate Passes a Pacific Railway Bill: 1858–59

In December, 1858, the bill which the Senate had postponed[33] was again taken up, and, after being variously amended, was passed by a vote of 31 to 20. It provided for three roads to be built of American iron. In arguing for the bill Mr. Gwin summed up the advantages from a revenue point of view under four heads: First, the sale of public lands would be increased; Second, the revenues from imports would be augmented; Third, the expenses of the war department would be decreased; and, finally, the expenses of the post office would be decreased and its income enlarged.

Perhaps the most striking thing about the discussion of this session was the prominence given to the rivalry between North and South. The speech of Senator Iverson is a case in point. "Now, sir, I have not a solitary doubt, that if only one road is provided for, and the route is left open to be selected by the company who shall undertake it, a northern route will be adopted . . . pouring all its vast travel and freights . . . into the northern States and cities of the Union . . . and, sir, I cannot but be surprised that any southern Senator

[32] See *ibid.*, pp. 348, 373, 415, etc.
[33] See above, p. 59.

should be willing to vote such a magnificent donation of land and money to one enterprise from which his section is likely to derive such trifling benefits. . . . Northern capitalists shun all southern investments as if the very touch was pollution. . . . I believe the time will come when the slave States will be compelled, in vindication of their rights, interests, and honor, to separate from the free States, and erect an independent Confederacy; and I am not sure, sir, that the time is not near at hand when that event will occur." [34]

The House took no action on the Senate bill.

Pacific Railway Bill Nearly Enacted: 1859–61

During the 1859–60 session—the first of the thirty-sixth Congress—no bill for a Pacific railway passed either house, though several were introduced. In the House, Mr. Curtis (Ia.) came to the front, and representing the majority of a committee of sixteen, argued for a bill for a central route:[35] the road would cost $120,000,000, one-half of which amount the government would furnish in the shape of thirty-year 5 per cent. bonds, to be repaid by transportation. Construction was to be carried out by a company of forty-five members.

It was at this session that the so-called Peoples' Pacific Railway Company, chartered by the state of Maine for building a railway and telegraph from the western boundary of Missouri to San Francisco, came before Congress with a petition for right of way and a grant of land.[36] At the next session a bill was introduced in behalf of this company but it was never favorably acted upon.

In December, 1860, the House again took up the subject of a Pacific railway, and, after some rough parliamentary practice, passed by a vote of 95 to 74 a bill for two roads with eastern branches, to be aided by a total subsidy of $96,000,000 in bonds and a land grant. The Senate amended this bill by adding a third road on the northern route, increasing the list of incor-

[34] *Cong. Globe*, 1857–58, p. 242.

[35] *Ibid.*, 1859–60, pp. 2329, 2336. See also *Rep. of Com.*, no. 428. A grant of land was included.

[36] *Sen. Misc.*, 1859–60, no. 52.

porators, and throwing more restrictions around the bond subsidy; and passed it, January 30, 1861, by a vote of 37 to 14. Upon its return to the House with the Senate amendments it failed to pass: the bill was cumbersome and crude, and the session was nearly over.

Pacific Railway Bills in 1853; Appropriation for Survey

The secession of the Southern states at once opened the door for the passage of a Pacific railway bill. For one thing, it simplified sectional conflict; and, again, it withdrew the stubborn opposition of Southern strict-constructionist states'-rights congressmen. As at the preceding campaign, so in 1860, the Republicans stood for immediate activity, resolving "that the Federal government ought to render immediate and efficient aid," and in May, 1862, the House passed the bill which with some modification was to become a law. It provided for the construction of a road westward from the 102d meridian to the California border, whence the Central Pacific Railroad Company, of California, would extend it to Sacramento. East of the 102d meridian a number of radiating branches made connections with different sections. Land was granted to the amount of ten alternate sections per mile, and bonds to the amount of $50,000,000. The vote stood 79 to 49.

In the Senate the bill was amended to extend the eastern terminus of the Union Pacific main line to the 100th meridian.[38] Mr. Trumbull opposed this amendment as authorizing a company to invade the territory of a state without that state's consent, inasmuch as the 100th meridian lay within the limits of Kansas; but as the terminal point was not fixed on a north and south line and might have been located in the territory of Nebraska the amendment was regarded by the majority as merely authorizing the company to take advantage of any existing charters. As amended the bill passed the Senate 35 to 5.[39]

There was considerable debate in the Senate over the provision requiring completion within a certain time on pain of for-

[37] A digest of the act is appended to this chapter.
[38] *Cong. Globe*, 1861-62, pp. 2675, 2749.
[39] *Ibid.*, p. 2840. See appendix to this chapter for digest of the act.

feiture, some holding that such restriction made the charter no grant at all and placed the company in the position of mere tenants at sufferance.[40] The view prevailed, however, that the charter was a contract in which the party of the first part simply made certain stipulations as a part of the agreement which in no way impaired it.

The Amendatory Act of 1864

The act of 1862 proved insufficiently liberal to attract capital and it did not make adequate provision for expropriating private property for right of way. It accordingly did not settle the haunting Pacific railway problem and Congress was at once called upon for further action. In December, 1862, at the third session of the thirty-seventh Congress, a bill was introduced in the Senate the chief provisions of which were (1) a decrease in the par value of shares, with the idea of making them more popular; (2) the granting of the bonds, which by the act of 1862 had been reserved till the completion of the entire road, upon completion of sections; and (3) provision for expropriation of private land for right of way.[41] This measure passed the Senate, but was not acted upon by the House.

It was in discussing this bill that Mr. Pomeroy (Kan.) proposed an amendment authorizing the company to enlist laborers under military discipline, on the ground that the road would be extended beyond the pale of government and some means of organizing the laborers, which would be largely drawn from abroad, was necessary. This extraordinary proposition was rejected by the Senate, 36 to 2.

At about this time, too, occurred the memorable battle of the gauges, in which the interests representing Chicago and the East demanded the "standard" gauge (5 ft. 8½ in.), St. Louis the broad gauge (6 ft.), and California the 5-foot gauge which then prevailed in that state. Early in 1863 an act was passed which established the standard gauge.[42] This act, then, was

[40] McDougal, p. 2778.
[41] See *Cong. Globe*, 1862-63, Index of bills, Sen. no. 439.
[42] *Statutes at Large*, **12**: 807.

supplementary to the act of 1862 which merely provided for a *uniform* gauge to be determined by the president.

At the 1863–64 session final action was taken. Both Senate and House passed bills and only agreed upon legislation through the medium of a conference committee. The Senate bill provided that instead of receiving government bonds the company might issue its own bonds upon which the government would guarantee interest;[43] the House bill was similar to that finally passed. Briefly the main substance of the act of 1864 may be given as follows:[44]

The par value of shares of stock was decreased from $1,000 to $100 and the total number of shares increased to 1,000,000. The board of directors was made to consist of 15 elected men and 5 government representatives. The land grant was doubled and made ten sections on each side, to be taken from within 20 miles of the road. Patents for these lands were to be issued upon the completion of each 20-mile section instead of the 40-mile sections of the act of 1862. The company was authorized to issue its own bonds to the amount of the United States bonds granted it by the previous act and these were to be a prior lien, thus relegating the government bonds to the position of a second mortgage. The bonds were to be issued upon completion of 20-mile sections. Time for completing the road was extended; and the provision that compensation received for government service should be applied to payments on the government bonds was modified to require the payment of only half such compensation. Congress specifically reserved the right to alter, amend, or repeal the act.

[43] *Cong. Globe*, 1863–64, p. 2327.

[44] See appendix to this chapter for details of the act.

APPENDIX TO CHAPTER VI

A

The following is a rather full summary of the Pacific railway act of 1862.

An act to aid in the construction of a Railway and Telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of same for Postal, Military, and other purposes.

Be it enacted that Walter S. Burgess, et al. (157 others), together with five commissioners to be appointed by the secretary of the interior, and all persons who shall or may be associated with them, and their successors, are hereby created as the "Union Pacific Railroad Company." Power is given to sue and be sued, etc., and to lay out, construct, furnish, maintain, and enjoy a continuous railroad and telegraph, from a point on the 100th meridian between the south margin of the valley of the Republican river, and the north margin of the valley of the Platte river, in the territory of Nebraska, to the western boundary of Nevada territory. Capital stock shall be 100,000 shares of $1,000 each, not more than 200 shares to be held per person. Persons named to constitute board of commissioners of the Union Pacific R. R. and Telegraph Co. Duty of board to open books for subscriptions. When 2,000 shares are subscribed for and $10 on each paid into the treasury, a meeting of stockholders is to be held, to elect not less than thirteen directors for said corporation. Thereafter the duties of the board of commissioners cease forever, and the stockholders then shall constitute said body-politic and corporate. At the time of the first, and at each triennial election of directors by stockholders, two additional directors shall be appointed by the President of the United States. These appointed government directors not to be stockholders in Union Pacific Railroad Company. Directors to elect officers. Power to make by-laws, etc.

Sec. 2. Right of way through public lands two hundred feet on each side of the track and the right to use materials from government lands are granted; U. S. to extinguish Indian titles as rapidly as possible.

Sec. 3. Every alternate, odd-numbered section of public land, to the amount of five sections per mile on each side of the railroad, within ten mile limits on each side, is granted,—excepting mineral lands. Such lands as are granted to be disposed of within three years.

Sec. 4. When forty miles of road (of best American rails) are completed, the president of the United States shall appoint three examining commissioners. If the road is satisfactory, titles to the land grants are to be given.

Sec. 5. Further, when forty miles have been satisfactorily completed, 30-year, 6 per cent. bonds of the United States to the amount of $16,000 per mile shall be paid to the company,—bonds with interest, to be redeemed at end of 30 years, and to constitute a first mortgage on the road and rolling stock. In case of default road to be taken over by the United States.

Sec. 6. The government shall have preference in the use of the railroad and telegraph, at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of services. All payment for service rendered the government shall be applied on bond and interest payments; and after completion at least 5 per cent. of net earnings shall be annually so applied. The above grants are made on condition that the bonds shall be paid at maturity and the road be kept in repair.

Sec. 7. The company is to file assent within one year; within two years the general route of the road is to be designated; and the road is to be completed before July 1, 1874.

Sec. 8. Defines limits of route—to connect at western boundary of Nevada with Central Pacific Railroad Company of California.

Sec. 9. Leavenworth, Pawnee, and Western Railroad Company of Kansas is authorized to construct a branch connecting with the Union Pacific R. R.; and the Central Pacific R. R. Co.

of California is authorized to construct a railroad and telegraph line from the Pacific coast to the eastern boundary of California.

Sec. 10. Said Kansas Co. shall complete 100 miles of their said road within two years after filing assent, and 100 miles per year thereafter until completed. The Central Pacific shall complete 50 miles within two years after filing assent and 50 miles per year thereafter until completed. After completing their roads they may unite to construct part of the Union Pacific line, with the consent of the state of Kansas. . . .

Sec. 11. For the 300 miles of the said road which are most mountainous and difficult of construction, to-wit: 150 miles west from the eastern base of the Rocky mountains and 150 miles east from western base of the Sierra Nevada mountains, the bonds issued shall be at the rate of $48,000 per mile, to be given, with lands, upon the completion of every 20 miles; and between the sections last named of 150 miles each, bonds shall be issued at the rate of $32,000 per mile, to be given with lands, for every 20 miles completed. Provided, that no more than 50,000 of said $1,000 bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph.

Sec. 12. In case of disagreement as to routes, the president of the United States is to determine location. The track over the entire road is to be of uniform width, with grades not to exceed the maximum grades of the Baltimore and Ohio.

Sec. 13. The Hannibal and St. Joseph R. R. Co. may extend its roads from St. Joseph via Atchison, to connect and unite with the road through Kansas. . . . and may for this purpose use any railroad charter granted by the Legislature of Kansas.

Sec. 14. Said Union Pacific R. R. Co. is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the state of Iowa, to be fixed by the president of the United States, upon the most direct and practicable route, to form a connection with the road at the 100th meridian. Also a branch road to connect the main stem with Sioux City,—as soon as a road is built through Minnesota or Iowa to Sioux City.

Sec. 15. Other companies may connect with the road of the

Union Pacific Company by consent of the president of the United States.

Sec. 16. All the companies herein mentioned may unite in a consolidated company upon filing notice with the secretary of the interior.

Sec. 17. The road is to be forfeited if a continuous line of railroad, ready for use, from the Missouri river to the navigable waters of the Sacramento is not completed by July 1, 1876. Of bonds to be given for any part of the line east of the 100th meridian and west of the west foot of the Sierra Nevada mountains there shall be reserved of each part and installment 25 per cent, to be and remain in the Treasury undelivered; and of other parts of the road, 15 per cent., until the whole of the road is completed.

Sec. 18. Whenever the net earnings exceed 10 per cent. per annum on the cost, Congress may reduce rates of fare if they are unreasonable. And Congress may, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act.

Sec. 19. Arrangements may be made with the Pacific Telegraph Co., the California State Telegraph Co., and the Overland Telegraph Co. to remove their lines of telegraph to the route of the railroad.

Sec. 20. The corporation hereby created and the roads connected therewith shall make annual reports to the secretary of the treasury, containing—

1. Names of stockholders and places of residence.
2. Names and residences of directors and officers.
3. The amount of stock subscribed and paid in.
4. Description of the lines of road surveyed, the cost of surveys, and the lines chosen for construction.
5. The amount received from passengers.
6. The amount received from freight.
7. A statement of expenses of road and fixtures.
8. A detailed statement of the indebtedness.

B.

The substance of the act of 1864 is as follows:*

An act to amend an act entitled "An Act to aid in the construction of a Railroad and Telegraph Line from the Mississippi River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.

Be it enacted *by the Senate and House of Representatives of the United States of America in Congress assembled,* That the capital stock of the company entitled the Union Pacific Railroad Company, authorized by the act of which this act is amendatory, shall be in shares of one hundred dollars, instead of one thousand dollars each; that the number of shares shall be one million, instead of one hundred thousand; and that the number of shares which any person shall hold to entitle him to serve as a director in said company (except the five directors to be appointed by Government) shall be fifty shares instead of five shares; and that every subscriber to said capital stock for each share of one thousand dollars, heretofore subscribed, shall be entitled to a certificate for ten shares of one hundred dollars each; and that the following words in section first of said act, "which shall be subscribed for and held in not more than two hundred shares by any one person," be, and the same are hereby repealed.

(Section 2 provided that, until the whole capital of one hundred million dollars was subscribed, books for receiving stock subscriptions should be kept open in seven cities which were named; that the cash payments required on subscriptions should continue the same; that the stockholders should be assessed on their holdings sums not less than five dollars per share, at intervals not greater than six months, until the full value had been paid in; that only money should be received in payment; that the capital stock should not be increased beyond the actual cost of the road.)

(Section 3 reduced the width of the right of way to two hundred feet, and provided elaborate machinery for obtaining possession of private lands needed by the road.)

* In the bracketed sections the excellent digest in White's *Hist. of the U. Pac.* is followed.

Section 4. And the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land.

(Section 5 extended one year the time for filing maps of the proposed routes and for completing the roads; provided that the Central Pacific Company need complete but twenty-five miles of track per year, instead of fifty, and that it be given four years to reach the state line; it provided, further, that one-half instead of the whole, of the sums earned by the roads by serving the government should be applied on the debt to the Government.)

(Section 6 modified section 4 of the act of 1862 so as to render it easier to get possession of the subsidies, and provided that the Central Pacific should receive its subsidies on the completion of twenty-mile sections instead of forty-mile sections.)

Section 7. *And be it further enacted,* That so much of section seventeen of said act as provides for a reservation by the government of a portion of the bonds to be issued to aid in the construction of said railroads is hereby repealed. And the failure of any one company to comply fully with the conditions and requirements of this act, and the act to which this is amendatory, shall not work a forfeiture of the rights, privileges, or franchise of any other company or companies that shall have complied with the same.

Sec. 8. *And be it further enacted,* That for the purpose of facilitating the work on said railroad, and of enabling the said company as early as practicable to commence the grading of said railroad in the region of the mountains, between the eastern base of the Rocky mountains and the western base of the Sierra Nevada mountains, so that the same may be finally completed within the time required by law, it is hereby provided that whenever the chief engineer of the said company, and said commissioners, shall certify that a certain proportion of the work required to prepare the road for the superstructure on any such section of twenty miles is done (which said certificate shall be duly verified), the secretary of the treasury is hereby authorized and required, upon the delivery of such certificate, to issue to said company a proportion of said bonds, not exceeding two-thirds of the amount of the bonds authorized to be is-

sued under the provisions of the act, to aid in the construction of such section of twenty miles, nor in any case exceeding two-thirds of the value of the work done, the remaining one-third to remain until the said section is fully completed and certified by the commissioners appointed by the president, according to the terms and provisions of the said act; and no such bonds shall issue to the Union Pacific Railroad Company for work done west of Salt Lake City under this section, more than three hundred miles in advance of the completed continuous line of said railroad from the point of beginning on the one-hundredth meridian of longitude.

(Sec. 9 gave authority to each of the companies named in the act to establish ferries or build bridges across the Missouri or other rivers which lie in its course, such bridges to be so built as not to interfere with navigation.)

And provided further, That any company authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid, may construct its road and telegraph line so as to connect with the Union Pacific railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits, and be subject to all the conditions and restrictions of this act: *Provided further, however*, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific railroad on the one-hundredth degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public land than are also herein provided.

Sec. 10. *And be it further enacted*, That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in said act and the act to which this act is an amendment, issue their first-mortgage bonds on their respective rail-

road and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies and public stores for the government of the United States. And said section is further amended by striking out the word "forty," and inserting in lieu thereof the words "on each and every section of not less than twenty."

Sec. 11. *And be it further enacted,* That if any of the railroad companies entitled to bonds of the United States, or to issue their first mortgage bonds herein provided for, has at the time of the approval of this act, issued, or shall thereafter issue, any of its own bonds or securities in such form or manner as in law or equity to entitle the same to priority or preference of payment to the said guaranteed bonds, or said first-mortgage bonds, the amount of such corporate bonds outstanding and unsatisfied, or uncancelled, shall be deducted from the amount of such government and first-mortgage bonds which the company may be entitled to receive and issue; and such an amount only of such government bonds and such first-mortgage bonds shall be granted or permitted, as added to such outstanding, unsatisfied, or uncancelled bonds of the company shall make up the whole amount per mile to which the company would otherwise have been entitled: *And provided, further,* That before any bonds shall be so given by the United States, the company claiming them shall present to the secretary of the treasury an affidavit of the president and secretary of the company, to be sworn to before the judge of a court of record, setting forth whether said company has issued any such bonds or securities, and, if so, particularly describing the same, and such evidence as the secretary may require, so as to enable him to make the deduction herein required; and such affidavit shall then be filed and deposited in the office of the Secretary of the Interior. And any person swearing falsely to any such affidavit, shall be deemed guilty of perjury, and on conviction thereof, shall be punished as aforesaid: *Provided, also,* That no land granted

by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road or part thereof, made prior to the passage of the act to which this act is an amendment, or made subsequent thereto under the provisions of any act or acts other than this act, and the act amended by this act.

(Sec. 12 provided that the Union Pacific, eastern division, should build a branch from the mouth of the Kansas river by way of Leavenworth, or else, within two years, build from Leavenworth to Lawrence; but should receive therefor no bond subsidy.)

And if the Union Pacific Railroad Company shall not be proceeding in good faith to build the said railroad through the territories when the . . . Union Pacific Railroad Company, eastern division, shall have completed their road to the one-hundredth degree of longitude, then the last named company may proceed to make said road westward until it meets and connects with the Central Pacific Railroad Company on the same line. And the said railroad from the mouth of the Kansas river to the one-hundredth meridian of longitude shall be made by the way of Lawrence and Topeka, or on the bank of the Kansas river opposite said towns: *Provided,* that no bonds shall be issued or land certified by the United States to any person or company, for the construction of any part of the main trunk line of said railroad west of the one-hundredth meridian of longitude and east of the Rocky mountains, until said road shall be completed from or near Omaha, on the Missouri river, to the said one-hundredth meridian of longitude.

(Sec. 13 changed the number of elected directors to fifteen, and of government directors to five. It provided that at least one of the latter must be a member of each standing or special committee, and provided for inspections of the property and reports to the government by the government directors.)

(Sec. 14 provided that the next election of directors should be at New York on the first Wednesday in October, 1864, and that subsequent elections should be annual, at the same place.)

Sec. 15. *And be it further enacted,* That the several companies authorized to construct the aforesaid roads are hereby

required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line; and in such operation and use, to afford and to secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others, and it shall not be lawful for the proprietors of any line of telegraph, authorized by this act, or the act amended by this act, to refuse, or fail to convey for all persons requiring the transmission of news and messages of like character, on pain of forfeiting to the persons injured for each offense, the sum of one hundred dollars, and such other damage as he may have suffered on account of said refusal or failure, to be sued for and recovered in any court of the United States, or of any state or territory of competent jurisdiction.

Sec. 16. *And be it further enacted,* That any two or more of the companies authorized to participate in the benefits of this act are hereby authorized at any time to unite and consolidate their organizations, as the same may or shall be, upon such terms and conditions, and in such manner as they may agree upon, and as shall not be incompatible with this act, or the laws of the state or states in which the roads of such companies may be, and to assume and adopt such corporate name and style as they may agree upon, with a capital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the department of the interior; and thereupon such organization, so formed and consolidated, shall succeed to, possess, and be entitled to receive from the government of the United States, all and singular the grants, benefits, immunities, guarantees, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions and requirements which said companies respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated, respectively. And all other provisions of this act, so far as applicable, relating or in any manner appertaining to the

companies so consolidated, or either thereof, shall apply and be of force as to such consolidated organization.

(Section 16 provides further that in case any company fails wholly or in part to build its line within the prescribed time, the consolidated company may build it on the terms originally offered, paying to the defaulting company the value of the work done and materials furnished. But the defaulting company may, at any time before the completion of the work, resume all its rights by paying the consolidated company the value of the work done and materials furnished by it. Any company refusing to enter a consolidation shall have equal rights with the consolidation. It is further provided that should the Central Pacific Railroad Company of California complete their line to the eastern line of the state of California, before the line of the Union Pacific Railroad Company shall have extended westward so as to meet the line of said first-named company, said first-named company may extend their line of road eastward one hundred and fifty miles on the established route, so as to meet and connect with the line of the Union Pacific road, and upon doing so, shall enjoy all the rights, privileges, and benefits conferred by this act on said Union Pacific Railroad Company.)

(Sec. 17 provided that the branch from Sioux City might be built by a company having a line reaching that point from the east, instead of being built by the Union Pacific Company, as per Section 14 of the Act of 1862. The bond subsidy was not to be increased by this change, and the land grant was to be five alternate sections on each side of the track for each running mile. Failure to complete this line within ten years of the passage of this act forfeited the portion already built.)

(Secs. 18, 19, and 20 referred to an extension of the Burlington and Missouri river road westward to a junction with the Union Pacific at some point east of the one-hundredth meridian.)

(Sec. 21 provided that before any lands should be given to the company receiving the grant, that company should pay the cost of surveying, selecting and conveying the same.)

Sec. 22. *And be it further enacted,* That Congress may, at any time, alter, amend, or repeal this act.

Approved July 2, 1864.

CHAPTER VII

ADMINISTRATION OF THE PACIFIC RAILWAY ACTS AND MANAGEMENT OF THE PACIFIC RAILWAYS: 1864–1887

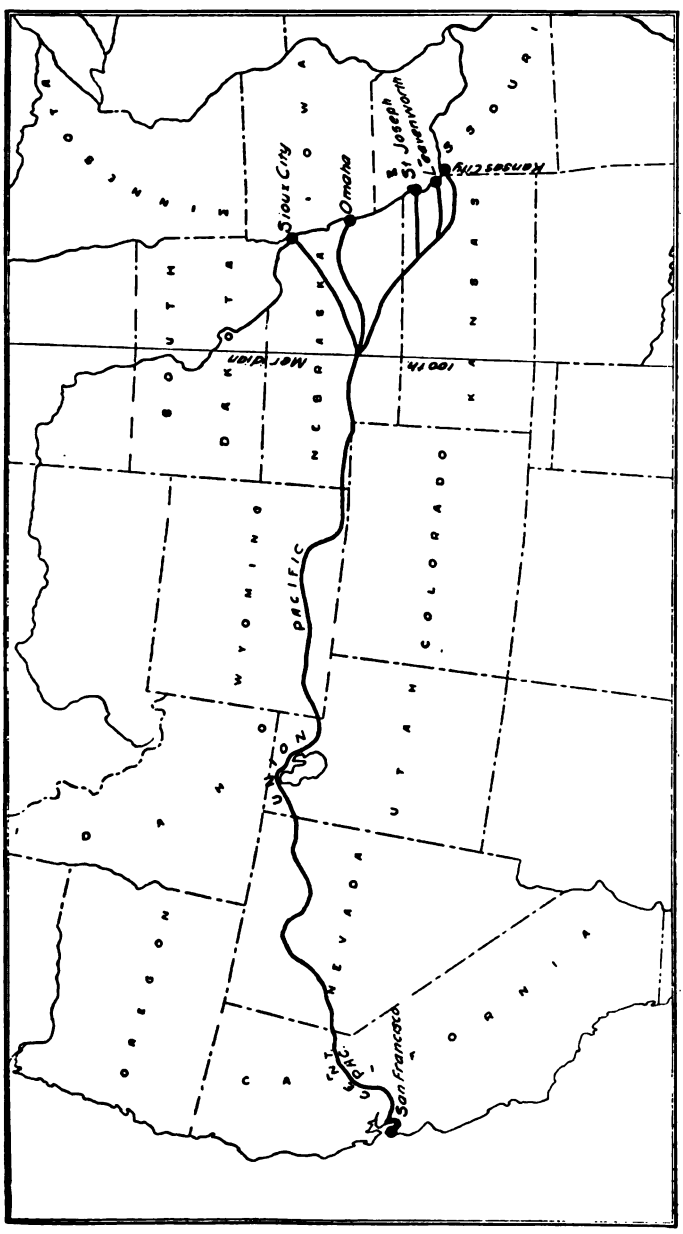
The Pacific Railways as Planned and as Constructed

The system of Pacific railways as originally planned embraced a trunk line westward from the 100th meridian, at which point branch lines radiated to connect various Missouri points. Or, to put it in another way, five lines were to be pushed westward from the Missouri, to converge on the 100th meridian, thence to proceed as a single great highway toward the coast. The Central Pacific would start at the coast and meet the Union Pacific near the California state line.

The five eastern branches were to have connected Sioux City, Omaha, St. Joseph, Leavenworth, and Kansas City, as appears in map I. When it came to actual construction, however, the symmetry of the plan was much marred, and map II. forcibly illustrates the difference between the plan and the reality.

The line from Sioux City, the Sioux City and Pacific, was extended southward and joined the Union Pacific—which was extended east from the 100th meridian to Iowa—at Fremont, Neb. In 1866 the Union Pacific Eastern Division, later the Kansas Pacific, was authorized to change its line and proceeded westward from Kansas City to Denver before making its junction with the main trunk. This necessitated changes in the branches which were to have joined it: the Leavenworth, Pawnee and Western[1] being extended southwest to connect at Lawrence, Kas.; the Central Branch, Union Pacific—first the Hannibal and St. Joseph, then the Atchison and Pike's Peak—

[1] For the affairs of this road see *Exec. Docs.*, 1882-83, no. 95.


Sioux City
Omaha
St Joseph
Leavenworth
Kansas City
Mer. Main
100th
Wyoming
Nebraska
Colorado
Utah
Nevada
Pacific
Union
San Francisco
Oregon
California

MAP I

being left without connection, as its bond subsidy was limited to 100 miles.

The Kansas Pacific was 638 miles long as constructed; but, as the original grant to the Eastern Division had been for a distance of 393.9 miles, only that extent, or about half, of the road as constructed was subsidized.[2]

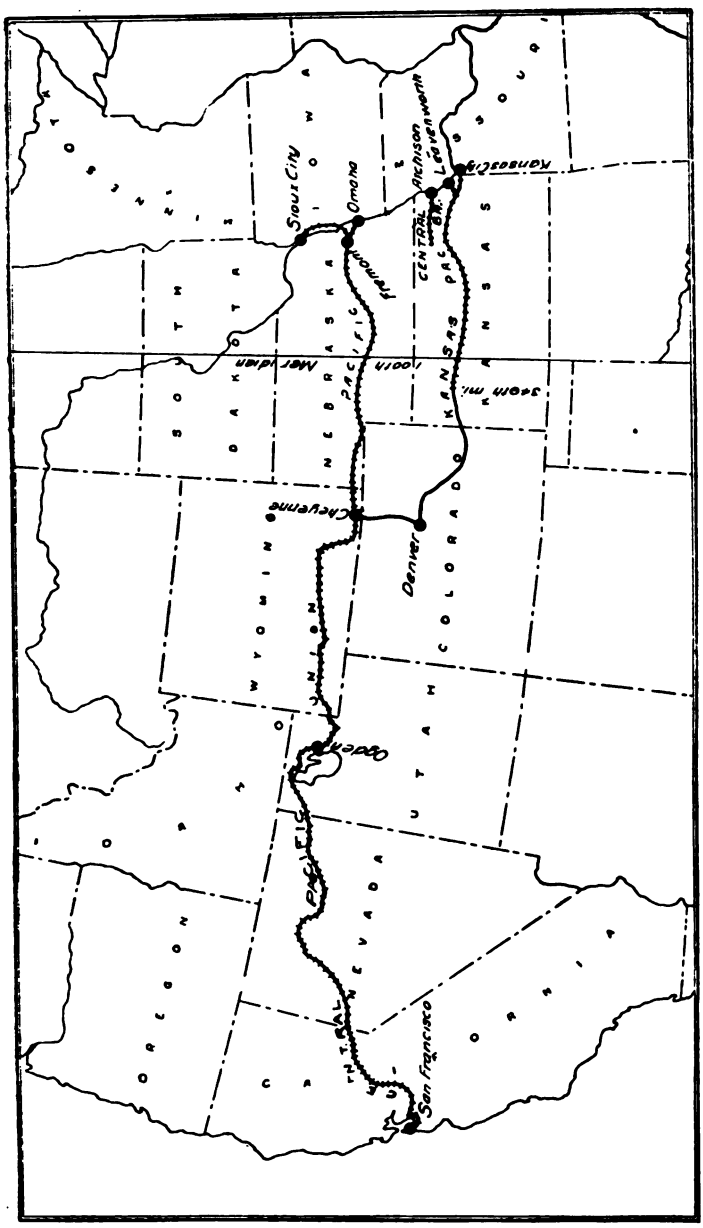
The main trunk between Sacramento and San Jose, in California, was built by the Western Pacific, but in 1870 this part was consolidated with the Central Pacific: the Central Pacific also built the main line eastward to Ogden, and was thus more important than originally planned. In 1880 the Union Pacific railway swallowed the Kansas Pacific and Denver Pacific (Denver to Cheyenne) lines, and after that date the Union Pacific system is to be distinguished from the Union Pacific railway.

The passage of the Pacific railway bills in 1862 and 1864 was but the beginning of the Pacific railway trouble. There remained the administration of the grants and subsidies and the enforcement of the conditions imposed; for the acts to some extent resembled a contract in that assistance was given on condition of certain services and concessions to be made by the railways.

The Roads Completed; Further Encouragement Being Given

The act of 1862 had proved insufficiently attractive to capital, and for some time after the more generous act of 1864 progress was but slow. The Union Pacific constructed but 38 miles in 1864 and 68 miles the following year, and during the same years the Central Pacific built some 54 miles only. The unsettled condition accompanying the war and the untried magnitude of the project retarded.

[2] See map II.


Sioux City
Omaha
Kansas City
St. Louis
Chicago
Cheyenne
Denver
Ogden
San Francisco
Pacific
Central Pacific
Union Pacific
Missouri River
Mississippi River
Nebraska
Colorado
Utah
Nevada
Oregon
California
Wyoming
Dakota
Kansas
Iowa
1033 m.
2826 m.
3690 m.

MAP II

About 1866, however, a change occurred, as is indicated by the table of miles constructed each year:

Year	Union Pacific[3]	Central Pacific
1864	38	31
1865	68	23
1866	361	38
1867	446	21
1868	474	315
1869	139	495
1870	281	69
1871	...	39
1872	3	112

Conditions industrial had become more settled and the future of the Pacific railways brighter. The opportunity to make great gain through floating speculative securities and the device of the construction company were seized upon by capitalists, and the roads were pushed forward rapidly.

In 1865 and 1866, too, amendments to the Pacific railway acts which made more favorable terms were passed by Congress. The companies were authorized to issue their bonds to the extent of one hundred miles in advance of a continuous completed line,[4] and the Union Pacific, Eastern Division, was empowered to determine its own route and to make its connection with the Union Pacific as far west as a point fifty miles west of Denver,—but to receive no greater amount of bonds.[5] Moreover, the Union and Central Pacific railways were authorized to advance construction until they met, with the provision that neither should begin work over three hundred miles ahead of its completed line. An attempt to exclude bridges and tunnels from the designation, "continuous and unbroken line," failed. In 1866, the right of way through military reservations 100 ft. in width was granted to the Union Pacific and branches, and a small grant made for a depot and other purposes.[6] Finally, by joint resolution, the time for completing the Union Pacific, East-

[3] Including Kansas Pacific, etc..
[4] 13 *Statutes at Large*, 504.
[5] See *Cong. Globe*, 1865-66, pp. 259, 3181, 3224, 3430.
[6] *Ibid.*, pp. 3782, 4117.

ern Division (and the Northern Pacific) was extended.[7] A similar favor was granted the Western Pacific with regard to its first section.[8]

Just when the Pacific railways were completed is disputed,[9] but for practical purposes the date at which the last section of each was accepted and bonds issued and lands ordered approved to the companies may be taken. In the case of the Union Pacific and Central Pacific roads, this date was July 15, 1869.[10] The Central Branch Union Pacific was completed January 20, 1868; the Kansas Pacific, in October, 1872.

The Reaction against the Pacific Railways: 1868

When, about the year 1867, the golden future of the Pacific railways was realized, their construction became a fruitful field for all manner of stock jobbery and corruption. Rumors of these things caught the public ear, which, it should be observed, was already struck with the first sounds preliminary to the Granger agitation. Then, as now, there were many to take advantage of the chance to make political capital by fanning a reaction. And the reaction, against government liberality in subsidizing railways, came,—came at about the same time the western states were entering upon a regulatory campaign against the railways.

Furthermore, public finances were beginning to seek a more normal course after the war disturbance. "In the midst of war, when the blood of the nation was up, . . . it was comparatively easy to pass financial bills and raise millions of money;" but in the fall of 1865 the national debt reached its highest point and a large part of the many millions of short term notes was due before 1868. The great question of resumption of specie payment was up. Naturally, then, more care was exercised in putting any further drain upon the treasury, and not only was a halt called to land grants and bond subsidies, but there was a

[7] *Ibid.*, pp. 2305, 2380, 2415.
[8] *Ibid.*, pp. 2050, 2723.
[9] See below, p. 89.
[10] See *Rep. of Com.*, 1875-76, no. 440, p. 10. For information concerning stockholders, surveys, early operating statistics, etc., see *Exec. Docs.*, 1871-72, no. 213—a valuable document for the early history.

tendency to construe past acts more closely than would otherwise have been the case.

Hostility to the Pacific railways was heightened by the extortionate rates charged.[11]

Premonitions of the reaction appear as early as 1866. A bill for granting land for a southern branch of the Union Pacific being up, the committee on Pacific railways, through Mr. Howard (Mich.), asked to be discharged of its further consideration on the ground that they thought no further pecuniary obligations ought to be assumed by the government in constructing branches of the Union Pacific.[12] The same man introduced a bill hostile to the Sioux City and Pacific Co., the roundabout route of which appears on the above map, charging it with extending its line 95 miles in order to advance five miles westward thus getting increased subsidies.[13] There is hostility in the resolutions calling for a statement of the amount of bonds issued to the Union Pacific, interest paid, and other information, which were agreed to in 1867.[14] Demands for reports and investigation began to appear. This changed attitude found both negative and positive expression as regards legislation. In January, 1869, for example, Congress refused a much urged bill to further assist the Central Branch Union Pacific;[15] and in 1868 an act relative to filing reports of railroad companies provided for suspending issues of bonds and land patents in case of failure to make reports as required by law.[16] Most notable in this connection was the joint resolution for the protection of the interests of the United States, passed in 1869.

The Joint Resolution of 1869

There were three main features in this resolution. In the first place it provided that Boston should be the place of the next stockholders' meeting, and authorized the establishment of general offices at any point in the United States. Secondly,

[11] See below, p. 108.
[12] *Cong. Globe*, 1865-66, p. 2050.
[13] *Ibid.*, p. 1954.
[14] *Ibid.*, 1867-68, p. 196, see also p. 98.
[15] *Ibid.*, 1868-69, pp. 547, 633, 664.
[16] *Statutes at Large*, **15**: 79.

Ogden was made the approximate terminus of the Union and Central Pacific railways. Finally, the idea of control was prominent. For one thing the president was to appoint a board of "eminent citizens" to examine and report the condition of the railways;[17] and he was required to withhold subsidy bonds sufficient to secure the completion as first class roads of all sections upon which bonds had already been issued.[18] And the attorney general was to make investigation whether the Central and Union Pacific railways had not forfeited their charters, paid illegal dividends, and their directors or agents violated the penal law.

The occasion of these various provisions was as follows: There was, beginning in 1867, a struggle between private financial interests for control in the directorate, one of which interests was able to secure injunctions from a corrupt New York court and so prevent elections;[19] hence the desire of a majority of the stockholders for some place of meeting other than New York and the first part of the joint resolution.

In 1869 the Union Pacific railway reached and passed Ogden. The Central Pacific proceeding from the west had not quite reached that point but had filed maps, etc., preliminary to constructing a section east of Ogden and overlapping the Union Pacific. The two roads were thus to some extent rivals and each would fain have dominated the coal supply and general traffic of the Salt Lake region. Ogden was, however, agreed upon as the mutual terminus; and in an act passed in 1870 the junction point was definitely fixed.[20]

The sections which expressed a suspicious or hostile attitude, in authorizing investigation or suspension of aid, have been accounted for in what has preceded, and most of the remaining pages of the congressional history of these railways is closely connected with them.

[17] See below, p. 89, for committee's report.

[18] Or he might receive first mortgage bonds as security. In default of security he might authorize and direct the attorney general to bring suit to compel the roads to give it. Under this section $1,000,000 subsidy bonds were withheld till the committee reported. Land patents were also suspended.

[19] See Davis, *The Union Pacific Railway*, pp. 203–4.

[20] *Statutes at Large*, **16**: 121.

Administration of the Bond Subsidy

Under the authorizing acts of July 1, 1862, and July 2, 1864, the following amounts of subsidy bonds were issued to the several Pacific railways:[21]

Union Pacific	$27,236,512
Kansas Pacific	6,303,000
Central Branch Union Pacific	1,600,000
Sioux City and Pacific	1,628,320
Central Pacific	25,885,120
Western Pacific	1,970,560
Total	$64,623,512

These bonds ran for thirty years and bore interest at 6 per cent payable semi-annually in January and July. Thus the question of interest payments might arise at once.

Now the grants of the act of 1862 were made "upon condition that said company shall pay said bonds at maturity, . . . and (1) all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid, . . . and (2) after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof." Two ways were provided for the current payment of the obligations of the companies, but several questions of interpretation were soon raised. In the first place the railway interests came to maintain that the act did not require the current payment of interest, but that principal and interest might be paid in a lump sum at the end of thirty years; and, in the second place, the meaning of the date of "completion" and of "net earnings" came into dispute. Finally, long before the principal of the bonds fell due, the question of the right of the government to require adequate provision for their retirement through sinking fund or otherwise was raised. These questions will be taken up in the above order.

[21] *Rep. of Com.*, 1875-76, no. 440, p. 5. For full statement of govt. expenditure for internal improvement down to 1873, see *Sen. Doc.*, 1873-74, no. 12.

1. Interest Payment Disputes

(a) *Time of payment.* There was ground for difference of opinion as to the time of interest payment in that no time was specified in the act and evidence from the debates is not very clear. An historian of the Union Pacific states his belief that Congress consciously and definitely refused to require the companies to pay the interest as it fell due;[22] the House committee on the judiciary reported in 1876 that in 1862 it was well understood in Congress that interest was to be paid as it accrued, adding that this "was expressly declared in debate when the measure was pending."[23] In both cases the same reference is given.

The facts are as follows:[24] Mr. White (Ind.) moved to amend the bill by adding: "It is declared to be the true intent and meaning of this section that the current interest on said bonds shall be chargeable to said company, to be by them reimbursed to the United States within one month after each semi-annual payment thereof by the United States, and a default therein shall subject the said company to the same liability and forfeiture above provided for in case of the non-redemption of the bonds at their maturity." The amendment was not carried; but it does not necessarily follow that the payment of interest as it fell due was not favored and apparently it was not on that ground that Congress rejected the measure. Mr. Campbell, the chief speaker against the amendment, definitely stated that it was the intention of the bill that the interest should be paid semi-annually. According to the information laid before Congress at the time it seemed clear that the provision made in the bill for interest payment by the railways was ample: "It has been demonstrated to the House that the cost to the Government of transportation to our forts in the Territories is more than double the amount of the entire interest upon the bonds proposed to be issued," and the bill is based upon this supposi-

[22] White, H. K., *History of the U. Pac. Ry.*, p. 75.
[23] *Rep. of Com.*, 1875-76, no. 440, p. 3.
[24] See *Cong. Globe*, 1861-62, p. 1911.

tion.[25] The amendment's provision for forfeiture, too, seemed very strict.

It is clear that Congress did not consciously and definitely refuse "to require the companies to pay interest as it fell due;" while, on the other hand, there is, to the extent that any doubt could exist as to the grounds for not passing the amendment, room for a denial that Congress "well understood" that interest was to be paid as it accrued.

It is the writer's judgment, however, that the reasoning of the government in favor of current payment of interest is, historically as well as justly, the stronger. Simply, in 1864, it was thought that one-half the payment for transportation service would be sufficient and so the question, as it later arose when this proved untrue, did not at that time confront Congress at all. When the question as to whether interest must be paid even if from some source other than specified in the act arose, it is to be regarded as a new or open question, and business usage and the *spirit* of the legislation should decide.

There can be no reasonable doubt that the theory of the bill was that the government was to make a *loan* to the Pacific railway companies.[26] The courts originally held that the relation between the two was not purely contractual; but the contention that the companies, as agents of the government for carrying out this great public object, were in a fiduciary relation and liable for the violation of a trust, is sound.

The fact that, beginning as early as 1870, hardly a session passed without some inquiry or resolution looking toward the payment of interest before the maturity of the bonds is of significance in this connection.

(b) *Half compensation inadequate.* The new question arose about 1870, the year following the union of the two main Pacific lines and the joint resolution of 1869. The demands of the government were met by the answer that interest advanced by it could only be repaid from the 5 per cent. of net earnings and one half compensation for services rendered, and any balance remaining due need not be paid until the maturity of the prin-

[25] *Ibid.*

[26] *E. g.*, see *Cong. Globe*, 1861-62, pp. 2816-2817.

cipal.[27] This source of interest payment, however, was proving entirely inadequate: the 5 per cent. of net earnings was not paid—the date of completion being under dispute—and by July, 1870, the interest due largely exceeded payments from half compensation. The total balance due was $7,101,563.[28] This deficit was steadily increasing.

Mr. Boutwell, secretary of the treasury, acting upon his own responsibility, proceeded to withhold *all* payments for services, and in this action he was supported by an opinion of the attorney general given December 15, 1870.[29] Apparently Congress was not quite ready for this step, however, for the Senate committee on the judiciary gave a divided report against the legality of such action, and in March, 1871, a provision was added to an act making appropriations for the support of the army which required the secretary to pay back to the Pacific railways money to the amount of one-half the compensation for services performed.[30] It was stipulated that this provision was not to affect the legal rights or obligations of the parties.

[27] See *H. Exec. Docs.*, no. 24, 41 Cong., 3 sess.

[28] It was distributed among the various companies as follows: Union Pacific, $2,543,987; Kansas Pacific, $569,261; Central Branch Union Pacific, $320,210; Sioux City and Pacific, $203,470; Central Pacific, $3,326,834; Western Pacific, $137,798.

[29] See 13 *Opinions Att'y Gen'l.*, 360-1; and *Exec. Docs.*, 1870-71, vol. 6, no. 24. Some idea of the amounts involved appears in the following: According to the quartermaster general's reports for 1872, the movement of government traffic over the Pacific roads was as follows:

	Persons	Materials (lbs.)
Union Pacific	3,645	14,501,918
Central Pacific	1,493	5,111,980
Kansas Pacific	3,939	16,858,340
Sioux City and Pacific	243	1,155,306
Total	9,320	37,627,544

Earnings settled during the year were:

Union Pacific	$399,193
Central Pacific	229,111
Western Pacific	64
Kansas Pacific	116,113
Sioux City and Pacific	6,373
Total	$800,857
Settlement in 1871	$767,047

[30] *Statutes at Large*, **16**: 525. There is some ground for thinking that this provision was obtained through improper practices by Pacific railways: see *Cong. Rec.*, 1877-78, p. 1760 seq.

But meanwhile the Wilson committee had been investigating the construction company, the notorious Credit Mobilier,* and the disclosures made aroused great public hostility. The year 1872 was a campaign year and political capital was sought for in this corruption. As a result of these developments, in 1873 the secretary of the treasury was directed to withhold all payments to any railway company on account of freights or transportation, which payments had not been reimbursed together with the 5 per cent. due, to the amount of payments made by the United States as interest on subsidy bonds.[31] This revoked the decision of 1871 and authorized action similar to that previously taken by Mr. Boutwell. The real purpose of the act was to raise the question and bring it up for decision.

The secretary so withheld payment and the Union Pacific brought suit. The railway won and the government appealed. Finally, in 1875, the supreme court affirmed the lower court's decision, holding the stoppage of payment for services illegal, and that the sum of $1,269,168 was due the companies as one-half compensation for services rendered since March 3, 1873.

That all this action was no tempest in a teapot is indicated by the following table which shows the balance due the government to have reached the sum of $23,417,000 by 1876.

TABLE SHOWING PAYMENTS BY PACIFIC RAILWAYS FROM TRANSPORTATION SERVICE AND BALANCE DUE FOR THE PERIOD, 1867–76.

Railway.	Interest accrued not yet paid.	Interest paid by U. S.	Interest repaid by transportation.	Balance of interest paid by U. S.
Union Pacific	$272,365	$12,701,420	$3,996,778	$8,704,641
Kansas Pacific	63,030	3,292,983	1,442,885	1,850,097
Central Branch Union Pacific	16,000	829,808	44,408	785,400
Sioux City and Pacific	16,283	731,553	39,112	692,441
Central Pacific	258,851	11 804,251	1,191,765	10,612,485
Western Pacific	19,705	781,496	9,367	772,441
Totals	$646,235	$30,141,513	$6,724,317	$23,417,195

* Crawford, *The Credit Mobilier of America*, Boston, 1880.
Davis, *The Union Pacific Railway*, ch. vi.
Nation, xxx: 467.
H. Rept., 42 Cong., 3 sess., no. 77.

[31] *Ibid.*, **17**: 508. It was further provided that the companies might bring suit in the court of claims and that appeals to the supreme court would have precedence.

(c) *Five per cent. of net earnings.* During the above mentioned litigation over the application of the act of 1873, another act, entitled an act providing for the collection of moneys due the United States from the Pacific Railroad Companies, was passed.[32] By it the secretary of the treasury was directed to require payment of 5 per cent. of net earnings as prescribed by law; and, upon failure to comply within sixty days, the attorney general was to bring suit. The railways refused to make the required payments and suit was brought by the attorney general,[33] pending the outcome of which the $1,269,000 was retained by the government.

The act of 1862, it will be remembered, provided that after the roads were "completed" they should annually apply "at least five per centum of the net earnings" to the payment of bonds and interest. But when were the roads "completed"? What is "net earnings"? The latter point is to a great extent the subject of controversy today,[34] and was not clear in those early days of railway individualism.

Question as to date of completion arose in the following manner. The President having appointed a committee of eminent citizens to examine the roads according to the joint resolution of 1869,[35] that committee reported on October 30 of the same year that considerable sums should be further expended to make the roads first class. In the case of the Union Pacific the amount was $1,586,100; $576,650 was the amount for the Central Pacific.

On the basis of this report the secretary of the interior ordered suspended the patenting of half the lands ready for the railways,[36] and these patents remained in suspense until 1874

[32] June 22, 1874. See *Statutes at Large*, 18: 200; *Cong. Rec.*, 1873-74, pp. 4436, 4936, 5322. The bill was introduced in the House by Mr. Williams (Mich.).

[33] See *Exec. Docs.*, 1875-76, no. 18. The sums claimed by the government are stated.

[34] The Southern railway, for instance, deducts taxes with operating expenses to arrive at net earnings; most other roads treat this item as a fixed charge to be deducted, with interest, etc., from net earnings.

[35] See above, p. 83.

[36] See *Rep. of Com.*, 1875-76, no. 440, p. 133 ff. This order was under date of Nov. 3, 1869. Prior to it the subsidy bonds withheld under the joint resolution had been restored.

when a commission, appointed upon application by the Union Pacific, reported the required improvements made.[37] (It is interesting to observe that the Union Pacific expended $2,215,975 and the Central Pacific $4,338,387 in excess of the amounts estimated in 1869.)

The question, then, is, were the Pacific railways "completed" in 1869 or 1874.

It would seem that the common-sense interpretation is that when net earnings appeared on regular transportation over the entire length of the road—i. e., in 1869—it was "completed" and liable to the 5 per cent. payment. It was in 1869 that the subsidy bonds were issued for the last section, and lands were made ready for patenting. In the suit brought to recover this 5 per cent. payment under the act of 1874, the court held that the company could not deny its completeness in 1869 inasmuch as it had played that part to secure subsidy bonds:[38] if the companies were completed for the purpose of obtaining subsidy bonds were they not completed enough to be liable for the 5 per cent.?

The railways claimed that by the joint resolution of 1869 and the report of the five eminent citizens they were held incomplete. This committee, however, reported itself as being "able to say that, in its opinion, while some expenditures still need to be made, these two roads are substantially such roads (*i. e.*, first-class) today." This was on October 30, 1869. On November 11, bonds and collateral were delivered to the companies and to set a later date of "completion" than this seems unreasonable. The courts in 1878 decided that the roads were completed November 5th, 1869.

It is fair to draw a distinction between completion and improvements such as widening road-bed or substituting iron for wooden bridges.

On the other hand, it is to be remembered that the government withheld some land patents till 1874, and in so doing laid itself open to the charge of inconsistency. Meanwhile, however, the railways had more lands than they could dispose of, and

[37] *Ibid.*

[38] *U. S. vs. U. Pac. R. R. Co.* 99 *U. S.*, 402.

seem to have made no demand for remaining lands till 1874, when the second commission reported that the deficiencies found in 1869 had been made good. Then the lands were patented to them.

As to "net earnings" there was a similar difference of opinion. The railways' interests led them to maintain that net earnings were reached by deducting the half compensation retained by the government, as well as interest on bonded debt, land grant expenses, and improvements and equipment charges from gross earnings; or, as the Union Pacific put it in its annual report for 1874, "Whatever this company has left of its earnings after payment of all its just and lawful obligations is net earnings." The government, on the other hand, insisted that the items mentioned should only be paid after net earnings had been reached, *i. e.*, be paid from net earnings.

On this point the railways' stand is clearly arbitrary and untenable. Then as now railways generally understood that gross income minus operating expenses (including replacement, and perhaps, taxes) equal net earnings; and expense of new construction, and fixed charges like interest on funded debt are to be paid out of net earnings. That Congress had this usual meaning of the term in mind is sufficiently clear from the 18th section of the act of 1862, where it is stated that "whenever it appears that the *net earnings* of the entire road and telegraph, *including the amount allowed for services rendered the United States, including repairs, and the furnishing, running, and managing of said road,* shall exceed ten per centum upon its cost . . . Congress may reduce the rates of fare."

In 1878 the court decided that net earnings were found by "deducting from the gross earnings all the ordinary expenses of organization and of operating the road, and expenditures made *bona fide* in improvements, and paid out of earnings, . . . but not deducting interest paid on any of the bonded debt of the company."[39] In case net earnings so ascertained did not equal interest on first-mortgage bonds and the 5 per cent., the interest was to be paid first. Thus the outcome was a compromise.

[39] 99 *U. S.*, 402.

Under this decision it was estimated that the amount due the government on the 5 per cent. to December 31, 1878, was $2,373,436.69; while there was due from the government $3,145,419.75 as the half compensation withheld pending the decision, leaving a balance of $771,983 due the company.[40]

It must be remarked that in this controversy the railways did much to foil the government. They refused to make adequate reports. The secretary of the treasury, in 1875, said: "If the requirements of the law in this regard had been complied with, the annual net earnings of these companies would have been shown, and these would have furnished a basis upon which to make a demand for the five per centum thereof.

"The companies did not, however, comply with the requirements of the act, and did not, upon a further demand of the Interior Department, furnish a statement of net earnings."[41] They also appear to have tried to gain their end by adopting after 1873 the category, "surplus earnings," in their reports instead of the usual "net earnings."[42]

The net earnings of the Pacific railways were considerable. In the year 1875 they were, by the reports of the companies, as follows:[43]

	Net earnings.	5 per cent.
Union Pacific	$6,148,365	$307,418
Kansas Pacific	1,212,722	60,636
Sioux City and Pacific	50,160	2,508
Central Pacific	8,031,498	401,574
Total 5 per cent. for 1875		$772,136

These figures represent a gradual, steady increase from 1870, when the Union Pacific showed net earnings of nearly three million and the Central Pacific over two and one-half million dollars.[44] The amount represents large returns on the investment, being, in 1875, about 16 per cent. on the capital stock, or

[40] Rep. of the Union Pacific to stockholders for 1878, p. 13.
[41] *S. Exec. Docs.*, 1875-76, no. 18, p. 10.
[42] See *Rep. of Comm.*, 1877-78, no. 440, p. 286.
[43] *Ibid.*, p. 13.
[44] Net earnings of Central Pacific, year ending June 30, 1870, were $2,527,960; year ending June 30, 1871, $3,580,560 (*Sen. Docs.*, 1872-73, no. 28).

nearly 12 per cent. on the funded debt not including subsidy bonds, and over 14 per cent. on each item for the Central Pacific. And, if we accept the statement that some two-thirds of the nominal cost of the roads represented waste and corruption, the percentages would be much higher. The inference that the companies were at this time well able to pay the five per cent. seems justified.

CHAPTER VIII

ADMINISTRATION OF THE PACIFIC RAILWAY ACTS AND MANAGEMENT OF THE PACIFIC RAILWAYS: 1864–1887 (Continued)

2. Sinking Funds; The Thurman Act of 1878

By 1876 Congress had come to fear that the government might never realize the principal of the subsidy bonds. The government had lost in the courts; the means provided for repayment of interest had proved inadequate, giving rise to an increasing indebtedness; while the railway companies were taking no steps to provide for meeting their obligations to the government upon maturity. The weakness of a second mortgage was realized.

The accompanying table illustrates the situation which confronted the public financiers:[1]

Principal of subsidy bonds.....	$64,623,512
Interest to maturity without compounding or counting interest on advances of interest	116,322,321
Total claim of government.....	$180,945,833
Amount provided to meet this claim.....	36,000,000
Deficiency	$144,945,833

In this situation the railways had to some extent the same interests as their public creditor, for their finances were hampered by that ever threatening sword of Damocles, hostile legislation. It would lend strength to their securities to have some

[1] *Rep. of Com.*, 1875-76, no. 440, p. 19. The $36,000,000 is the estimate for 5 per cent. of net earnings, and transportation service.

provision for retiring their maturing subsidy bonds with interest. The position is well stated by the president of the Union Pacific in a letter written in 1875:[2]

"The mortgage held by the government, in its terms and by judicial decision of the United States circuit court, cannot be enforced until the maturity of the bonds, which is near the close of the present century.

"The bonds are accumulating an interest-account, also uncollectible until the principal is due. The principal and interest when due will amount to the very large aggregate of over seventy-seven millions of dollars, though the actual amount advanced by the government was only $27,236,512.

"For this very large amount the government has only a second mortgage, and if it be allowed to accumulate, without any provision being made to meet it, the company will probably be utterly unable to pay it.

"At the same time, it is equally manifest that the government will be unable to collect it, except upon the assumption that it will advance the money to discharge prior mortgages, and run the road on government account—a policy which wise statesmanship could not advise.

"By standing still, therefore, the company has a load of debt accumulating for which no provision is made, and the government is drifting further and further from the opportunity to secure a just return for its advances."

Thus the interests of both parties dictated some provision in the way of a sinking fund; as to the exact provision, however, there was difference of opinion. That the railway felt itself in a position to decide is evidenced by these words from its annual report: "That no legislation on this subject will be binding unless assented to by the stockholders is now generally conceded."[3]

The first step taken by Congress was negative in character. The act of March 3, 1873, provided that the Union Pacific Railroad Company should issue no new stock nor mortgages or

[2] Letter from Sidney Dillon, president of Union Pacific, to B. H. Bristow, secretary of treasury, dated Feb. 9, 1875; found in *Rep. of Com.*, 1875-76, no. 440, p. 93.

[3] Rept. to Stockholders of Union Pac. R. R. for 1876, p. 10.

pledges made on property or future earnings without leave of Congress, except for funding or renewing debts then existing. This prohibition seems to have had little effect and was evaded in practice.[4]

As early as 1874 the Union Pacific Company proposed a settlement through annual payments sufficient to retire its debt to the United States;[5] in 1875 both Union Pacific and Central Pacific made proposals to Congress involving fixed annual payments and the crediting of the roads with the amounts claimed by them for transportation and mail service;[6] and in 1876 bills for sinking funds were introduced at the instance of the Union Pacific and Central Pacific companies.[7] The most salient feature of these railway bills was the proposition that their unsold lands be taken at a value of $2.50 per acre and carried to the credit of the sinking fund. Furthermore the sinking fund was to be credited with the amount which might be due the companies for transportation of mails, troops, etc., to the end of 1875; while semi-annual payments would be made by the companies sufficient, together with the above amounts, to retire the government bonds with interest at maturity.

On January 1, 1876, the Union Pacific had on hand 10,884,039 acres of land, which, at $2.50 would have meant a credit of over $27,000,000; similarly the Central Pacific could have paid over $21,000,000 in this easy fashion. The Union Pacific actually proposed to apply only 6,000,000 acres of the above amount.

Some of the objections to accepting the railways' proposition were as follows:[8] Their object was held to be to escape taxation on the lands, and to prevent the pre-emption of the same. If the government took the lands at $2.50 an acre it must sell them at that price plus interest to date of sale or suffer loss; whereas, if they were pre-empted at $1.25, the price of the lands retained by the railway companies would be decreased. Furthermore, it was their poor lands that the railways proposed to turn over to the government, the Union Pacific offering all lying

[4] See below, p. 102 f.
[5] Rept. of Union Pac. R. R. Co. for 1884, p. 187.
[6] *Exec. Docs.*, 1875-76, no. 25.
[7] 44 Cong., 1 Sess., S. 687, and S. 870, and *H. Rec.*, 3138.
[8] *Cong. Rec.*, 1875-76, p. 3809 ff.

west of the 100th meridian in Nebraska, Wyoming, and Utah. Finally, the fact of the worthlessness of the lands made it probable that the government would ultimately lose them; they remained subject to land-grant and sinking fund bonds of the companies, and, though the bill provided that "whenever" they should be sold the companies would free them from such encumbrances, the prospect of sale was remote.

Also, when the Union Pacific proposed to pay annually the sum of $500,000, to be put at 6 per cent. interest and to be in full settlement of all claims by the government, it was fairly clear that, inasmuch as the sums claimed by the government for 5 per cent. of net earnings and half transportation exceeded that sum and would be currently applied to payment of the government's interest expenditures, without allowing interest to the company and reducing its obligation, a further imposition on the government's generosity was intended.

At this time (1876) the House showed its temper by passing a bill, the main provisions of which were: that any money due from the United States to any subsidized railway company should be withheld to the amount of the government's claims; that all claims due the United States and unreasonably withheld should bear 6 per cent. interest; and that such railways should establish sinking funds for the payment of interest and principal of loans.[9] It was declared unlawful to pay dividends while in default for sixty days; and any director or officer interested in any contract with a railway company, except for his own compensation, was made liable to fine and imprisonment.

The main line of opposition to this bill was the vested rights plea. Mr. Hurd (O.) argued that the bill was unconstitutional and impaired the obligation of contracts.[10]

This attitude was vigorously assailed. It was maintained that Congress might alter, amend, or repeal, the right to prescribe the method according to which the companies should meet their obligation following from this reserved power. The com-

[9] *Ibid.*, p. 4432. The Union Pacific was to pay $750,000 annually for ten years beginning 1876, and $1,000,000 a year thereafter till its debt was settled; the Central Pacific, Kansas Pacific, Central Branch Union Pacific, and Sioux City and Pacific were to pay lesser sums.

[10] *Ibid.*, p. 4457.

panies' charters might be forfeited on quo warranto and their franchises sold to another.[11] The vested rights plea was styled a claim to the power to contract debts with a vested right to refuse to provide for their payment.

The bill was considered in the Senate but made little progress.[12]

In 1877 there was a heated wrangle in the Senate[13] over a bill (S. 984) which proposed to define net earnings, to retain the whole compensation for transportation service furnished the government, and to require a sinking fund amounting to 25 per cent. of net earnings. Vested interests and contract rights were again the center of discussion; and Mr. Hitchcock (Neb.) declared that in 1862 people and Congress expected no return for their aid. This bill was postponed by a vote of 29 to 28.

The step finally taken by Congress was quite similar. On May 7, 1878, the so-called Thurman Act—its author being Senator Thurman (O.)—was passed, the provisions of which must be briefly stated.

"*Whereas,*" it runs, "the total liabilities (exclusive of interest to accrue) to all creditors, including the United States, . . . of the Union Pacific Railroad Co., are more than $8,000,000; and

"*Whereas,* the United States, in view of the indebtedness and operations of said railroad company, and of the disposition of net earnings, are not, and cannot without further legislation be secure in their interests in and concerning said railroad," a sinking fund is established. The act proceeded to require the company to pay the government 25 per cent. of its net earnings, interest on first mortgage bonds having been deducted. Of the 25 per cent. (1) an amount equal to one-half the receipts from government transportation was to be applied currently to interest account; the remainder constituted the sinking fund. This fund consisted of (2) the other half of receipts from government transportation, (3) 5 per cent. of net earnings, (4) so much of $850,000 in the case of the Union Pacific, or $1,200,000 for

[11] See *ibid.*, p. 3807 ff.
[12] *Ibid.*, pp. 4510–4513.
[13] *Ibid.*, 1876–77, pp. 1081, 1100, 1260, 1280, 1308, etc.; bill postponed, p. 1962.

the Central Pacific, as might be necessary to bring the total (1, 2, 3, and 4) up to the required 25 per cent. Roads other than the Union and Central Pacific lines were not required to maintain such a fund.[14]

If 75 per cent. of net earnings were insufficient to pay interest on first-mortgage bonds the secretary was to remit enough of the 25 per cent. to cover the deficit.

Upon pain of fine and imprisonment, no dividends were to be declared until interest on first-mortgage bonds and the 25 per cent. credit to the sinking fund should be paid.

This sinking fund was to be established in the United States treasury and to be invested in government bonds, the interest of which was to be invested semi-annually in a similar manner, thus bringing compound interest. Five per cent. was the rate planned for, but, as the 5 per cent. bonds could only be purchased at a considerable premium, about 2 per cent. was actually obtained.

As in the bill postponed in 1877, "net earnings" was defined, the definition allowing the deduction of interest on first-mortgage bonds as an operating expense, but drawing the line at interest on government indebtedness and expenditures for necessary improvements. This definition was not retroactive.

The debate in the Senate over the Thurman bill (S., 15) was long and keen. Among the best statements of the case for the bill are those of Thurman (O.), Davis (Ill.), and Morgan (Ala.).[15] If no provision were made for meeting bonds at maturity the companies would be jeopardizing the future use of their roads for government purposes: any construction of the law which would postpone action until the contingency of insolvency should occur would defeat the very purpose of the acts. The government was entitled, whenever in its opinion necessary, to interfere to secure at all times the use of the road for postal and military purposes. If a power is given by statute, everything necessary to make it effectual is implied; and, the ends in view being pointed out by the act of 1862, if there

[14] See *ibid.*, 1877-78, pp. 4551, 4589 for debate on including Kansas Pacific.
[15] See *ibid.*, pp. 1688, 1693; 1856 respectively.

was a necessity for the creation of a sinking fund to obtain them, such a fund was legal.

By the act of 1864 the right to alter, amend, or repeal was definitely and without limitation reserved to Congress, and the courts had held that this act was one with the original act of 1862. The law authorizing the postmaster general to alter or amend mail contracts had been often used and with great practical effect, and the application of such a power in regard to a corporation created by Congress should be even more full.

If there must be default, before Congress could act, was not withholding 5 per cent. of net earnings default? Was not the disobedience of the stipulation requiring the capital stock to be paid for in cash at par default? The fact that the roads had issued first-mortgage bonds in excess of actual needs and had by a policy of "stripping and waste" paid dividends derived from the United States treasury was ground for action.[16]

It was maintained that Congress could not place limitations on its own power to make further enactments; that in legislating for the general welfare there were no limitations. And, in any case, the action of one Congress did not necessarily bind succeeding Congresses.

As to vested rights: "If Congress can sell and dispose of its constitutional powers beyond a right to resume their exercise at the behest of the general welfare of the public, it can strip itself finally of all powers and authority by granting it upon considerations, and in form of vested rights to corporations which it may create."

There was no little hostility to corporations, and especially railway corporations, displayed; and more than one senator bitterly suggested that the railways controlled Congress. This would be a test case. "If they" (the railways), said Mr. Beck (Ky.), "have the power to defeat this proposition I see but one remedy left,—to repeal the charters and distribute the assets. The right to repeal cannot be denied; . . . we can get something now out of the wreck; we will get nothing but corporation domination if we submit to the defeat of this bill."[17]

[16] *Ibid.*, p. 2192 (Morrill, Vt.).
[17] *Ibid.*, p. 2137.

As usual the cry of vested rights and contract obligations was raised in opposition. Congress would do nothing with a contract but enforce it in case of default, and the courts had no right to anticipate a default.[18] One Congress might undo the laws of a predecessor, but not its contracts. Congress functioned in a double relation: as sovereign legislative power it conferred power of attorney upon the government to make a contract, in which second capacity—as a contracting party—it was the creditor. "The bill proposed by the Judiciary proposes to establish a sinking fund by legislative act only, by the sovereign will of the creditor, not only without the assent of the debtors, but by a command, a failure or refusal to obey which by the debtors shall work a forfeiture of estate, and subject them and their agents to criminal prosecution."

Finally, the friends of the company took their stand on the decision of the supreme court that the subsidy-bond interest paid by the government was not due until the maturity of the bonds.[19]

Blaine offered an amendment that would probably have made any further alterations by Congress impossible, which was defeated 23 to 35,[20] and the bill passed the Senate April 9, by a vote of 40 to 20, with 16 absent. In the House, after much parliamentary battling, the bill passed almost unanimously, 243 to 2.[21]

The railways appealed to the courts for relief from the Thurman act, but its constitutionality was upheld by the supreme court in a divided opinion. Chief Justice Waite read the decision. He stated that the companies had earned large sums above interest on bonds, which had been for the most part paid out as dividends, no provision being made for payment of the government debt. By following such a course, however, present stockholders were profiting at the expense of the future of the corporation: "The current earnings belong to the corporation, and stockholders, as such, have no right to them as against the

[18] See *ibid.*, pp. 2056, 2258, (Hill, Matthews, Conkling).

[19] Above, p. 88.

[20] *Cong. Rec.*, 1877-78, pp. 2528, 2359.

[21] Butler (Mass.), and Lynde (Wis.) There were 46 not voting. See *Cong. Rec.*, 1877-78, p. 2779 ff.

just demands of creditors.''[22] The statute was upheld as a reasonable regulation of the affairs of the corporation and promotive of public welfare. It gave further assurance of the continued solvency of the company and injured no one.

The dissenting judges held that the act violated the contract between the government and the railway.

Needless to say the companies were surprised at the decision, and always acting under good legal advice, the Union Pacific proceeded to make the best of the situation by attempting to restrict the application of the act. The two chief points at issue were:[23] (1) should expenditures for new construction and equipment be deducted from gross earnings to get ''net earnings,'' *i. e.*, be charged to expense account; (2) what was a fair and reasonable rate for mail service. Both points bore on the size of net earnings. The first point, for example, meant a difference for the Union Pacific of $95,557 during 1882;[24] and the same company had a charge against the United States for mail service covering the period from February, 1876,—when the company gave notice it would no longer acquiesce in the rate fixed by the government,—to December 31, 1882, which exceeded the allowance of the postmaster general by upwards of $3,500,000.[25]

The court of claims passed upon these questions in January, 1885, the government being upheld in its contention concerning mail service rates, the railways winning on the other point. By agreement and by order of the court, all claims and counter claims under the Thurman Act down to January 1, 1883, were covered by the decision; and, in the case of the Union Pacific, the net result was a payment of $916,704 by the railway to the government.

Resistance in the courts was not the only means adopted by the companies to cut down net earnings for sinking-fund purposes. The Central Pacific, for example, diluted its subsidized mileage by leasing other lines to which its traffic was diverted, thus reducing net earnings assignable to bond-aided portions.[26]

[22] 99 *U. S.*, 700.
[23] See *Sen. Docs.*, 1883-84, no. 121.
[24] Annual report for 1882.
[25] *Ibid.*, 1883, p. 15.
[26] *Exec. Docs.*, 1880-81, no. 87.

And in 1879–1883 the Union Pacific by means of issues of collateral trust bonds practically defeated the law prohibiting further increase of liens prior to that of the government without the consent of Congress.

Clearly the adequacy of the Thurman sinking fund depended largely upon the amount of net earnings.[27] If net earnings should decline, the 25 per cent. would follow; if this decline went so far as to make the one-half payment for transportation amount to 20 per cent. of net earnings, the half compensation plus the 5 per cent. would make the whole fund and no part of $850,000 or $1,200,000[28] would be required.

The "total surplus earnings" of the Union Pacific in 1878 was $7,744,686; deducting $1,634,940 interest would leave $6,109,746 as "net earnings" upon which to figure the 25 per cent., thus making $1,527,436 on government account. There would still have been, according to the railway's report, an amount equal to 7½ per cent. on the capital stock available for dividends. Neither in 1878 nor 1879, however, did the company pay anything to the government under this act, the amount due it on half transportation account being sufficient to meet requirements.[29]

On the basis of the above figures, and assuming 5 per cent. on invested funds and interest, the provisions of the Thurman bill would have sufficed. As has been stated, however, 5 per cent. was not realized; and, after 1882, net earnings fell off,[30] so

[27] Neither did the measure pass unchallenged on this ground: "There never will be any net proceeds to it if it is profitable—never. There is not any railroad in the country where there is anything of rights reserved to the government that ever had any net receipts. The stock all runs into the hands of a comparatively small number of people, . . . and every one of them is amply paid and no net receipts ever come in." Mr. Collamer, in *Cong. Globe*, 1861-62, p. 2818.

[28] See above, p. 98.

[29] Report of Union Pacific R. R. Co. for 1879, p. 16.

[30] The following figures show the course of the net earnings of the Union Pacific Railway Company: 1880-1887.

1880	$11,730,535
1881	11,625,037
1882	11,983,278
1883	10,356,965
1884	8,941,909
1885	8,404,676
1886	7,552,707
1887	9,111,886

that the indebtedness of the companies to the government steadily increased! In the government directors' report for 1883 it was stated that the Thurman act was a failure.

In only one year did the interest and sinking fund accounts of the Union Pacific equal the interest annually paid by the United States; in the case of the Central Pacific they never did so. The average annual sinking fund accounts for the Union Pacific and Central Pacific systems during the five years from 1881 to 1885, inclusive, were $752,193 and $328,154, respectively.

The condition of the sinking fund on November 1, 1887, was as follows:[31]

	Securities.		Cash.	Total market value and cash.	Sinking fund and transportation service from beginning to Nov. 1, 1887.
	Par value.	Market value.			
Union Pacific	$6,150,650	$7,732,050	$2,033	$7,734,084	$7,674,154
Central Pacific	2,710,000	3,418,559	36	3,418 596	3,681,862
Total	$8,860,650	$11,150,609	$2,070	$11,152,680	$11,356,017

Opposite this small fund should be placed the statistics of debt:[32]

	Total principal and interest at maturity.	Total credit on bond and interest account (to July 1, 1888).	Remainder at maturity.	Worth as of July 1, 1888, discounted at 3 per cent.
Central Pacific	$71,671,574	$6,328,612	$65,342,962	$50,993,320
Kansas Pacific	17,491,943	615,749	13,876,193	11,080,731
Union Pacific	75,352,347	12,160,542	63,191,805	49,557,235
Central Branch, Union Pacific	4,426,608	323,024	4,103,584	3,285,495
Western Pacific	5,433,029	9,567	5,423,462	4,155,095
Sioux City and Pacific	4,509,255	134,823	4,374,432	3,404,226
Totals	$178,884,759[33]	$22,572,319	$156,312,440	$122,482,106

It is little wonder that the commission appointed to investigate the Pacific railways reported in 1887 that it "is univer-

[31] As reported by the government actuary, Dec. 1, 1887: Rept. of Pac. Ry. Commission, *Sen. Exec. Docs.*, 1887-88, no. 51, p. 17.

[32] *Ibid.*, Nov. 1, 1887, to July 1, 1888 estimated. The last column is reached by simple discount; at compound discount the present worth would be less.

[33] The difference between this amount and the "total claims of the government" in the table on p. 94 is due to the fact that the estimate for interest is over $2,000,000 greater in the earlier table.

sally conceded by every person of intelligence who has given the subject any study, that it is and will be absolutely impossible for the Union Pacific Railway or system to pay the indebtedness to the United States at its maturity."

As early as 1880—two years after its passage—serious steps were taken to amend the Thurman act.[34] The chief point concerned the securities in which the fund should be invested. Only the last year of our period, 1887, however, saw such an amendment carried. By this new provision the secretary of the treasury was authorized to invest the sinking fund in the first-mortgage bonds of the railways concerned or in any government bonds issued in aid of Pacific railways,[35] thus enabling him to secure a more adequate return on funds which were either lying uninvested or earning only some 2 per cent.

A question which was closely connected with the sinking fund problem and which was always with Congress was, what would come of the government's claim if the first-mortgage were foreclosed. In this same act of 1887 provision was made for such a contingency. It was enacted that whenever it should become necessary for the protection of the interests of the United States in its lien on any property on which a prior lien might be due, the secretary of the treasury should "redeem or otherwise clear off such paramount lien . . . by paying the sums lawfully due in respect thereof out of the treasury; and the United States shall thereupon be subrogated to all rights and securities thereto pertaining . . . "

Auditor of Railroad Accounts Created: 1878

About a month after the passage of the Thurman Act, Congress took further steps toward clearing up the Pacific railway tangle and securing publicity. The ground was cleared by repealing section 20 of the act of 1862 and the act of July 25, 1868, relative to filing reports. Then the office of auditor of railroad accounts was established as a bureau of the interior department. This official, with his assistants, was to prescribe

[34] See *H. Rep.*, 1879-80, no. 762, and *Cong. Rec.*, p. 1239.
[35] *Statutes at Large*, **24**: 488, s, 5.

a system of reports to be rendered to him by all subsidized railways whose lines lay in whole or in part west, north, or south of the Missouri river. These companies must make such reports as he might require and submit their books and records for inspection upon request, neglect or refusal making them liable to fine. He was to examine the books of each such railway company at least once in each fiscal year, and to furnish such information concerning rates and the accounts of the companies to the various departments as might be by them required, or as he might deem expedient for the government's interests. An annual report concerning the physical and financial condition of the companies was also to be made to the secretary of the interior.

Further duties were to assist the government directors when they officially requested, and to see that the laws relating to the companies embraced under this act were enforced.

The act, which was passed June 19, 1878, took effect July 1, 1878.[36]

The Pacific Railway Commission of 1887

Though the auditor made investigations and reports under the preceding law, the people and Congress were not satisfied. There was a feeling of uneasiness and hostile suspicion. The railways suffered from this and complained that it furnished a basis for constant attacks upon their securities in the stock market. They asked for an investigation.[37] After several resolutions to this end had been defeated, an act[38] was finally passed in 1887 which resulted in an elaborate investigation and report. By this act the president was to appoint three commissioners who were empowered to examine books, papers, and methods of the bond-aided railways. They were to examine into the working and financial management of such roads, investigating assets, net earnings, branch lines, unlawful dividends, discrimination, rebates, influence on legislation, relations and obligations

[36] See *Cong. Rec.*, 1877-78, pp. 4062, 4877. Passed House 188 to 13.

[37] See Report of Union Pacific for 1886, pp. 7-15 for full discussion of the situation from the railways' point of view.

[38] *Statutes at Large*, 24: 488, ss. 1-4. Needless to say it was not passed with the idea of doing the railways a favor.

to government and many other matters. A report was to be made, and $100,000 was set aside to cover expenses.[39] Some of the chief matters treated by the commission are taken up in the following pages.

Pacific Railways Influence Legislation

The Pacific railway commission of 1887 reported that in their judgment, "moneys of all the bond-aided roads have been used for the purpose of influencing legislation."[40] While they could point to no direct proof of bribery, yet it was impossible to read the evidence of men like Huntington and Stanford without concluding that very large sums had been expended. The railway officials made frequent use of money and passes to influence legislation, vouchers for which were often insufficient. It was testified that in both state and federal courts juries were given passes.[41] It was also the practice of the companies to issue passes to legislators and judges. Not only was there lobbying at the national capitol, but in the legislative seats of Kansas, Nebraska, Colorado, and elsewhere, full representations were maintained and millions were expended for the services of lawyers to influence legislation.[42]

In 1878 Senator Hoar said in debate that some persons in the employ of a Pacific railway were in Washington during the passage of a bill favorable to the railway's interests, and at an ensuing meeting of the directors authority was given to expend $167,000 for "special legal expenses." A government director testified that he left the room when this matter came up because he did not want to know what these expenses were for![43]

The Union Pacific, at least, entered into election contests, becoming a powerful force in politics, especially in Nebraska. It enlisted the services of postmasters and revenue officials to influence bond elections. And, finally, it induced its employees to vote as its interests dictated.

[39] The report made in 1887 with the testimony fills nine volumes and makes a very valuable source for Pacific railway conditions prior to that date.
[40] Report, p. 121.
[41] Evidence, p. 1250.
[42] See Report, p. 144 for amounts.
[43] *Cong. Rec.*, 1877-78, p. 4551.

It is to be remembered, however, in this connection, that at this time such practices were very common. To place passes where they might do good, to expend money for lawyers and lobbyists that they might argue, persuade, and entertain, when hostile legislation threatened, was quite general then and has not entirely disappeared at the present writing (1908). And, while the above practices are to be condemned and the means taken to conceal them were loathsome, the legislative attacks on the railways were numerous and often unreasonable.

That lack of regard for their public functions by the railways lay at the bottom of such attacks, is also to be remembered.

Rates and Discrimination

Section 18 of the act of 1862 provided that whenever net earnings should exceed 10 per cent. on the cost of the roads, exclusive of the 5 per cent. to be paid the United States, the rates might be reduced by the government if they were unreasonable. No action, however, was taken under this provision and it does not seem to have been of any practical effect. Such provisions have always proved futile.[44] Either by padding "cost of road" or concealing net earnings, or both, 10 per cent. would never be reached; in this case, the government would have had to prove the rates unreasonable even if over 10 per cent. was yielded.

In the earlier years, before the Union Pacific was completed, rates were very high. Passenger rates ran as high as 10 cents per mile and in 1871 averaged 7.5 cents. In 1873 the quartermaster general reported[45] that the average rate paid for troops was 5.2 cents on through business and 8 cents on local business, making an average of 6.6 cents per man per mile. The average freight rate per 100 lbs. per 100 miles paid by the government was 40.5 cents. We are told that the people of Fremont declared that they could get goods from Omaha, some forty miles distant, cheaper by wagon than by rail.[46] In response to complaints of the kind the House passed a resolution in 1868[47]

[44] See *Bul. of U. of W., Econ. and Pol. Sci. Series*, **3**: 210.
[45] *Exec. Docs.*, 1872-73, no. 169.
[46] Davis, *U. Pac. Ry.*, p. 207.
[47] May 12.

which provided for a board of commissioners to fix rates over the Union Pacific and Central Pacific railways not to exceed double the rates on the trunk lines. Being referred in the Senate to the committee on the Pacific railroads, the resolution was not pressed and never passed. The railways reduced their rates after completion, and after 1880 competition compelled further reductions.

The average receipts per passenger mile on the Union Pacific decreased from 3.34 cents in 1881 to 2.30 cents in 1887, and the ton mile receipts fell from 1.98 cents to 1.27 cents within the same period. The movement of rates on the Central Pacific was similar, freight rates being uniformly somewhat higher and passenger rates lower than on the Union Pacific.[48]

The later complaints concerning rates seem to have been directed against discrimination rather than extortion. It was charged that, while the law provided that the railways should transport for government at fair and reasonable rates not to exceed those charged private parties for like service, the government was discriminated against. The railways' own reports show a much higher average per passenger per mile from government sources than others.[49] Also, to the extent that rebates were given, the government was discriminated against in common with all not receiving such concessions. In 1880 a Senate committee reported that such discrimination against the government as existed was usually of this character.[50]

There was a great deal of complaint by individuals and companies;—but it must be remembered that the Pacific roads were,

[48] *Rep. of Sec'y of Interior*, 1886, **2**: 586.

[49] Union Pacific:—Average rates per passenger per mile by sources.

	1881.	1882.	1883.	1884.	1885.	1886.
	cents.	cents.	cents.	cents.	cents.	cents.
Conductors	5.25	4.70	4.72	4.34	3.23	3.64
Local	3.46	3.50	3.60	3.40	3.21	2.81
Home coupons	3.20	3.20	2.54	2.20	2.52	1.65
Foreign roads	3.20	3.07	3.00	2.60	2.45	1.61
Government	6.50	5.00	4.94	5.00	4.73	3.64
Total through		3.06	2.89	2.55	2.50	1.44
Total way		3.64	3.42	3.13	2.85	2.52
Total average	3.34	3.29	3.12	2.90	2.74	2.13

[50] *Sen. Rep.*, 1879–80, no. 504.

from the manner of their construction and the nature of the society around them, treated with particular hostility, and, moreover, the practices complained of were by no means peculiar to the Union Pacific. There were well founded charges of favoritism shown toward one or two elevator and smelting interests. For instance, the minority report of 1887 states that the Omaha and Grant Smelting and Refining Company—which numbered among its stockholders Sidney Dillon and F. L. Ames, directors of the Union Pacific—received rebates amounting to $570,000 within three years, and was allowed free switching at its yards worth $15,000 a year; while rates were so adjusted as to greatly favor the points at which its works were located.[51]

The railway also engaged in quarrying stone, driving others out by charging them excessive rates. It mined and sold coal from Wyoming territory and gave a virtual monopoly of the Colorado business to a rebate-favored company. "In order that it might retain a complete monopoly of the coal traffic, it refused to lease any of its coal lands on royalty; and it acquired unlawfully, by private entry and by the use of the names of its employees, the ownership of the government coal lands adjoining its own property . . ."[52]

Relations with Other Railways

The relations of the Union Pacific with other railways were in not a few cases unfortunate. In the first place its attitude toward pro-rating with connecting lines caused much litigation and hostility. Section 12 of the act of 1862 and section 15 of the act of 1864 both provided that the various Pacific railways should be operated as one continuous line, yet as early as 1872 the Kansas Pacific found ground for complaint in that the Un-

[51] *Sen. Exec. Docs.*, 1887-88, no. 51, p. 182.

[52] *Ibid.*, p. 184. *Sen. Docs.*, 1872-73, no. 28 gives an account of a contract between the Union Pacific and the Wyoming Coal Company made in 1868. By this contract a monopoly was established along the line for fifteen years. The railway guaranteed at least 10 per cent. on the coal mined and agreed to purchase all the coal needed at exorbitant prices, though the coal company was not bound to furnish all the coal needed. A drawback of 25 per cent. on coal freight rates when for general consumption rendered the monopoly complete. The company was favored as to sidetracks. The Union Pacific held nine-tenths of the stock.

ion Pacific refused to pro-rate and charged it local rates on passenger and freight for through traffic.[53] Apparently no trouble was experienced with the Central Pacific, that line being willing to pro-rate on the business of the Kansas Pacific as it did with the Union Pacific.[54]

The Union Pacific's local passenger rate from Cheyenne—where the Kansas Pacific joined it—to Ogden was $46.50, first class; while its through rate from Omaha to Ogden was only $54.00. As Cheyenne lay about half way between these points the Kansas Pacific interests held that traffic between points on their line and Ogden should receive a rate of $27.00 (½ of $54.00) from Cheyenne to Ogden rather than the high local rate.

The legislatures of Kansas and Illinois both petitioned Congress in opposition to the stand of the Union Pacific, on the ground that their agricultural and commercial interests suffered.[55]

Finally, in 1874, after many similar ones had been introduced, a bill was passed making additions to the fifteenth section of the act of 1864. It enacted that any officer or agent of the Pacific railways who should refuse to operate his road as one continuous line or to afford equal advantages and facilities as to rates, time, etc., should be guilty of a misdemeanor and liable to fine and imprisonment.[56]

The passage of this act by no means remedied the situation, for when in 1876, the Kansas Pacific went into the hands of the receiver the failure was attributed largely to the fact that "the Union Pacific . . . persistently refused to transfer passengers and freight in connection with the Kansas Pacific and Denver Pacific companies" as required by law.[57] In 1878 the attorney general reported that the remedy was judicial and suggested more explicit legislation.[58]

The upshot of the matter was that the two lines were consolidated in 1880, the operation being attended by the injection of

[53] See *H. Misc.*, 1871-72, no. 82.
[54] *Sen. Misc.*, 1873-74, no. 54.
[55] *H. Misc.*, 1873-74, nos. 167, 244.
[56] *Cong. Globe*, 1873-74, pp. 4434, 5022, 5315.
[57] *Exec. Docs., Rep. of Sec'y of Int.*, p. 35 (Serial no. 1800). See *H. Rep.*, 1877-78, no. 430 for this whole subject.
[58] *Exec. Docs.*, 1877-78, no. 32.

considerable "water" into the company's capitalization. The basis of the operation was an exchange of the stock of the Kansas Pacific and Denver Pacific lines at par for an equal amount of Union Pacific stock. As the former securities were of slight value, their price being far below "Union Pacific," the exchange resulted in excessive capitalization, and, incidentally, in large gain to the holders of Kansas Pacific, Jay Gould and his associates.[59]

Other roads than the Kansas Pacific were discriminated against: namely, the Sioux City and Pacific, the Missouri Pacific, and the Burlington and Missouri River. In December, 1876, a bill which would have compelled the Union Pacific to charge the same rates per mile on the latter's traffic from Ft. Kearney to Ogden as it charged between Omaha and Ogden, was debated in the House.[60]

Other inter-railway relations chiefly concern competition and pooling. In the early eighties competition became menacing to the earnings of the original Pacific lines, driving them to the construction or purchase of branches and feeders, the payment of subsidies, and the formation of pooling agreements. The Pacific Mail Steamship Company was subsidized to prevent ocean competition; various northern lines were paid for not entering certain territories; and, through the Transcontinental Pool, the Northern Pacific was induced by subsidy to keep out of San Francisco. In the minority report of the Pacific Railway Commission of 1887 it was stated that the Union Pacific was a member of the following pools: between Denver and eastern points, Western Colorado Railway Association, Utah Traffic Association, Nebraska Traffic Agreement, Montana Traffic Agreement, Oregon Traffic Association, and the Transcontinental Pool.[61] And there were other minor pooling agreements, notable among which was one with the Denver and Rio Grande concerning the traffic between Denver and Leadville. In fact all the bond-aided roads—as, indeed, most others—were members of a great variety of pools, and after the passage of the Interstate Commerce

[59] *Ibid.*, no. 151, pp. 56 ff., 110.
[60] *Cong. Rec.*, 1876-77, pp. 99, 173.
[61] *Exec. Docs.*, no. 51, p. 188.

Act substantially the same ends were obtained through rate agreements.

The majority of the commission of 1887 reported that pools were, in their essence, neither good nor bad. "When resorted to for the purpose of attempting a monopoly, and the imposition of burdensome rates, they should be severely condemned. When resorted to for the purpose of preventing ruinous competition, they may serve a good purpose. Pooling agreements, with proper provisions for publicity as to the terms of the contract between the constituent members, and as to the rates to be charged, if subjected to reasonable supervision and control, are beneficial both to railroads and to the communities which deal with them."[62] It seems that too often the object of the above pools was to maintain excessive rates, while they proved ineffectual against the decline in net earnings which came after 1882.

[62] *Ibid.*, p. 125.

CHAPTER IX

THE SOUTHERN ROUTE TO THE PACIFIC

The South suffered much from the Civil War. Among the economic losses was that which came with the construction of the first transcontinental railway without reference to her interests; and one of the urgent demands of her statesmen during the dark days of reconstruction was a Pacific railway over the "southern route." There can be little doubt that, but for the war, the first railway would have been on or near the thirty-second parallel. In 1853 the Gadsden purchase was made largely to acquire that route, and by 1860, so a committee report of 1878 states, "this was the line which public opinion had settled as the one to be constructed."[1]

No comprehensive history of the occupation of the southern route has been written, and it will be especially interesting to trace the development of the originally favored way, when peace and union brought the energies of the nation to bear upon it.

Perhaps it would be more minutely accurate to speak of the southern *routes*, for in the southern march to the Pacific there were two distinct lines taken. One of these was planned to extend along the thirty-fifth parallel; the other along the thirty-second, the latter occupying in part the Gila river route as secured by the Gadsden purchase, the former following the Santa Fe trail and the valley of the Colorado. But both were focused on the passes of southeastern California, uniting in one line before reaching the coast; and as opposed to the "northern route" or the "central route" they formed the "southern route." This is especially clear when the objective point, the Pacific, is considered, together with the barrier of the Rockies.

[1] *Rep. of Com.*, 1877-78, no. 619, p. 6.

When, however, one turns to the points of eastern connection, widely separated points like St. Louis and Memphis on the one hand and New Orleans on the other constitute the termini. The route is one; simply it is bifurcated, as is the central route at the west, with its Oregon Short Line.

In the exploitation of this southern route, three different railways came prominently before Congress and it will be necessary to perform the rather difficult task of keeping their courses distinct while at the same time weaving them together—even as they were woven.

The Atlantic and Pacific

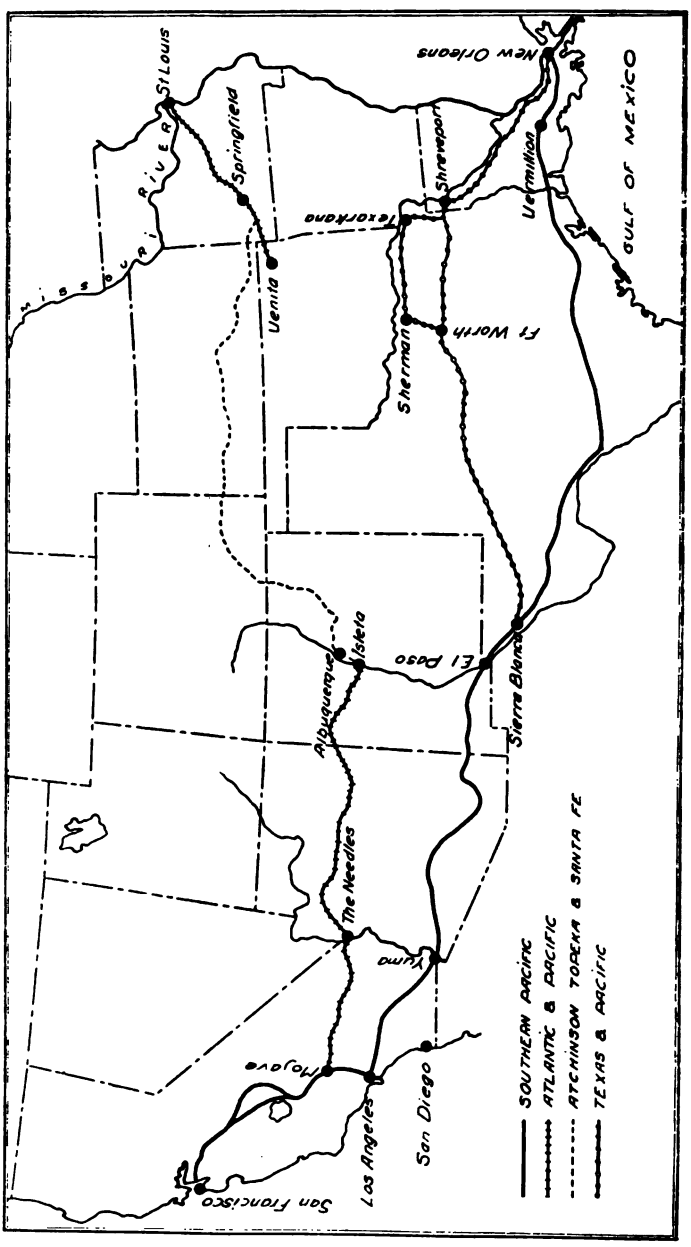
On December 11, 1865, a bill granting lands to aid in the construction of a railway and telegraph line from Missouri and Arkansas to the Pacific coast by the southern route was introduced in the Senate;[2] it was referred to the committee on Pacific railroads favorably reported, and became a law on July 27, 1866, by the signature of President Johnson. The Atlantic and Pacific was the result.

This was the first company chartered and aided by Congress to construct a Pacific railway over the southern route, and by its agency the fourth through route between the East and the Pacific coast was opened.

Beginning at or near Springfield, Mo., the road was to proceed to the Canadian river and to Albuquerque, thence along the thirty-fifth parallel to the Colorado—and to the Pacific. From its intersection with the Canadian river a branch was to be extended eastwardly to the border of Arkansas.

In addition to a two-hundred-foot right of way and the usual right to take materials from adjacent public lands, a land grant of twenty odd-numbered sections per mile on each side of its line was made. This applied only to the territories; within the bounds of a state the donation was but half as large. The railway company was to receive the lands by twenty-five mile sections as such sections were reported satisfactorily completed by an examining commission.

[2] *Cong. Globe*, 1865-66, p. 806.


St Louis
Springfield
Vernita
Texarkana
Shreveport
Vermilion
New Orleans
GULF OF MEXICO
Ft Worth
Sherman
El Paso
Sierra Blanca
Isleta
Albuquerque
The Needles
Yuma
Mojave
San Diego
Los Angeles
San Francisco
SOUTHERN PACIFIC
ATLANTIC & PACIFIC
ATCHINSON TOPEKA & SANTA FE
TEXAS & PACIFIC

[116]

The road was to be of uniform gauge, equal in all respects to railways of the first class, and its rails of the best quality of American iron.

It is notable that in this charter Congress provided that, if the route taken should coincide with another road which had received government aid, the previous grant would be deducted; and especially this,—"that no money shall be drawn from the treasury of the United States to aid in the construction of the said Atlantic and Pacific Railroad." By 1866 Congress had become more wary than in 1862.

Then, too, the act required that $1,000,000 be subscribed and 10 per cent. be paid in within two years, that construction be begun in two years, that not less than fifty miles a year be built after the second year from beginning, and that the whole should be completed by July 4, 1878, finally, that if any violation of the act was continued through one year, the government might complete the road.

Other provisions made the railway a post route and military road, provided that government rates should be no higher than to individuals for similar transportation, required sworn annual reports to the secretary of the interior, and reserved the right to alter, amend, or repeal.

Two further provisions remain for special attention. One of the chief grounds of discussion over the bill arose from the fact that the line of the road crossed Indian lands.[3] The Cherokees and Chickasaws objected to the section which made it the duty of the United States to extinguish Indian titles as rapidly as might be consistent with public policy and the welfare of the Indians, and, as finally passed, the bill provided that extinguishment should be only by the voluntary cession of the Indians.

The other provision authorized the Southern Pacific Railroad of California to connect with the Atlantic and Pacific at any point near the eastern boundary of California for the purpose of forming a line to San Francisco. The Southern Pacific, if such connection were made, was to make its gauge and rates uniform with those of the Atlantic and Pacific and was to re-

[3] *Ibid.*, p. 1100.

ceive the same grants—subject to the same obligations—as the latter road. Thus Congress met the Southern Pacific for the first time and largely aided the road which was soon to monopolize transcontinental traffic over the southern route; but of that, more will be said further on.

In 1867 and 1868 bills were introduced to amend the above act and to further facilitate the construction of the road, but made little or no headway.[4] And in 1869 a joint resolution to extend the time for construction came to nothing. These measures are to be taken in connection with the fact that the Atlantic and Pacific project almost immediately fell into financial difficulties and constructed no mileage until 1871, in which year the census of 1880 credits the company with 33.87 miles of line, all lying in Indian Territory. Accordingly, in 1870, in connection with another bill to amend the charter,[5] we find citizens of New Mexico objecting to aiding a company which could not build the road. It was simply holding the line of the thirty-fifth parallel and keeping others out. The railway company maintained that as the right of way had not been obtained from the Indians it should be relieved of the requirement to construct fifty miles per year beyond the western line of Missouri.

The final outcome of the company's efforts for further government relief came in 1871 when an act to enable the Atlantic and Pacific Railroad Company to mortgage its road was passed.[6] By this act the company was authorized to mortgage its road, franchises, lands, etc., the mortgage to be filed and recorded with the secretary of the interior.[7] This included no government guaranty. Later—immediately following the crisis of 1873—vain attempts were made to get the United States to guarantee the company's bonds.

In 1872 the company leased the Pacific railroad of Missouri, later the Missouri Pacific, which it operated until 1875; and in November of that year it went into the hands of the receiver.

[4] *Ibid.*, 1867-68, p. 601; 1868-69, pp. 440, 975.

[5] *Ibid.*, 1869-70, p. 506, 1075, 4570. Bill not carried.

[6] *Ibid.*, 1870-71, pp. 133, 744; *Statutes at Large*, **17**: 19.

[7] The government protected itself by stipulating that in case of charter violations the rights of claimants under the mortgage should extend only to so much of the lands as should be coterminus with the road completed at the time of foreclosure.

Then, in September, 1876, the entire property of the Atlantic and Pacific was sold to Wm. F. Buckley and by him conveyed to the St. Louis and San Francisco Railway Company.

Here one might hope that this much tried company might rest and prosper. Not so. In 1880 there came a reorganization and the Tripartite Agreement between the Atlantic and Pacific, St. Louis and San Francisco, and Atchison, Topeka and Santa Fe companies. The Atlantic and Pacific was divided so as to form a "central division"—from the western boundary of Missouri to Albuquerque,—and a "western division" extending from Albuquerque westward. At this time there were but 34 miles constructed on the central division, the road reaching to Vinita in Indian Territory. The western division had been located, but no construction begun.

The Tripartite Agreement provided for immediate construction. To finance the plan first-mortgage bonds up to $25,000 per mile secured by the company's whole property, and income bonds up to $18,750 per mile were to be issued. These the Santa Fe and Frisco companies guaranteed up to 25 per cent. of their gross earnings on traffic interchanged with the Atlantic and Pacific. And if that road were unable to pay interest during its period of construction the same companies agreed to make the necessary advances.

The two owned practically all the stock of the Atlantic and Pacific—a joint control being the scheme.[8]

Between 1872 and 1881 construction had ceased. Between 1881 and 1883 some 450 miles were built and the Atlantic and Pacific pushed to the Colorado river at The Needles.[9]

Here westward construction stopped. Perhaps the crisis of 1883 was partly responsible, but the chief reason was the opposing interest of the road which Congress had mentioned in one section of the act of of 1866, authorizing it to build a *branch* to San Francisco, the Southern Pacific Railroad Company. Mr. Huntington—who, with Senator Stanford dominated the Southern Pacific—was a controlling factor in the St. Louis and San Francisco; and when the latter road acquired the Atlantic and

[8] See *Poor's Manual*, 1886, p. 622.

[9] The financial standing of the Atlantic and Pacific as reported to the com-

Pacific its fate was sealed. Practically the Southern Pacific secured an agreement that the Atlantic and Pacific should not be extended beyond The Needles, and thus nipped a prospective rival and invader.

Here a pause must be made in tracing the occupation of the southern route in order to sketch the rise of the Southern Pacific.

The Southern Pacific

In 1861 California by a general law enacted that any ten or more persons who were subscribers to the stock of a contemplated railway through that state or any territory contiguous might constitute a corporation for the purpose of owning and operating such a railway. Under this provision, on December 2, 1865, the Southern Pacific Railroad Company of California filed articles of incorporation. Its purpose was stated to be the construction of a railway from San Francisco to San Diego, thence to the eastern line of California, where it would connect with a contemplated line to the Mississippi. The road had already, during 1863 and 1864, built some 50 miles of line.

missioner of railroads in 1883 was as follows: (*Exec. Docs.*, 1883-84, **10**: 443 ff.):

Assets:		
1. Construction—		
Old	$21,746,834	
New	59,704,261	
		$81,451,095
2. Cash		243,191
3. Land Department		24,220
4. Accounts receivable		29,445
Total		$81,747,953
Liabilities:		
1. Funded debt		$26,098,822
2. Unclaimed interest		2,100
3. Unpaid pay-rolls		23,612
4. Bills and accounts payable		4,417,579
Total debt		$30,542,113
5. Capital stock		51,510,300
Stock and debt		$82,052,413
Deficit		204,460

On December 31, 1886, the company's balance sheet showed a deficit of over $3,000,000.

It was this company that Congress, by the act of 1866 incorporating the Atlantic and Pacific, authorized to construct a branch to San Francisco and upon which it bestowed a large grant of public lands.[10] The railway was unable to live up to the time requirements set by Congress and in July, 1868, an act was passed extending time for construction. Thus it was given until July 1, 1870, to construct the first thirty miles and was required to build a minimum of only 20 miles each succeeding year.[11] During 1868 the company built only 15.8 miles; in 1869, 36.5 miles; and none at all in the following year.

In 1870 the Southern Pacific of California had only 80 miles of line, extending from San Francisco to Gilray. In that year, however, it consolidated with three short California roads,[12] with a view to constructing from San Francisco to the southeastern boundary and a branch from Tehachapa Pass to the Colorado near Mojave; in 1874 the Loss Angeles and San Pedro was added; and on June 30, 1875, the Southern Pacific Railroad Company (incorporated Dec. 18, 1874) had some 342 miles of road.

Now it should be remembered that the Southern Pacific Railroad Company of California as incorporated was to have proceeded via San Diego; but when, in 1867, the company filed its map of the route to the Colorado river for the purpose of securing the grant of public lands under the act of 1866 it did not touch San Diego.[13] It took a more direct route by way of Mojave. Lands were withdrawn, however, to the amount of some seven and one-half million acres. Suit was brought to have the withdrawal set aside, and in 1868 and 1869 the secretary of the interior suspended the withdrawal of lands. The matter was practically settled on June 28, 1870, when Congress by joint resolution declared that "the Southern Pacific Railroad Company of California may construct its road and telegraph

[10] See above, pp. 20, 115.

[11] *Cong. Globe*, 1867-68, pp. 2624, 2792, 4343; *Statutes at Large*, **15**: 187. During 1869 bills to expedite construction and to grant land to Stockton and Santa Barbara branches failed. See *Cong. Globe*, 1868-69, pp. 1363, 1159, 851.

[12] The San Francisco and San Jose (incorp., 1860), the Santa Clara and Pajaro Valley (1868), and the California Southern (1870).

[13] This and the following facts appear concisely stated in *H. J.*, 1875-76, p. 555f.

line as near as may be on the route indicated by the map filed" in 1867. So the railway won and was placed in a position to intercept the coast-ward march of the Atlantic and Pacific.

The next important appearance of the Southern Pacific before Congress led to similar results. In 1871, the act chartering the Texas Pacific Railroad Company provided "that, for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas and Pacific road at or near the Colorado river," the grants and conditions being the same as in the act of 1866. Thus the Southern Pacific again profited by Congress' generosity, and at the same time strengthened its strategic position in the transcontinental situation; it occupied the western termini, and, though the act expressly stipulated that the rights of the Atlantic and Pacific and other roads were to remain intact, these were merely paper and of little avail against tangible occupation—especially when Stanford was in Congress, Huntington in Frisco, and the two all but ruled California.

Congress in 1875–76 resolved to inquire if the Southern Pacific had a right to lands in California, its route having been changed from that designated,[14] but nothing seems to have come of it.

Meanwhile construction was being pushed; by June 30, 1876, the Southern Pacific Railroad Company could report a total of 711 miles; and in May, 1877, the California line was reached. Then in 1879 construction on the Southern Pacific of Arizona was begun in earnest, 182 miles being built that year, and by the close of 1880 its mileage equalled 293. The Southern Pacific of New Mexico carried the road across the southernmost extremity to that territory, over the Rio Grande, to El Paso, Texas. Ninety-two miles east of this point, at Sierra Blanca, the Southern Pacific joined hands with the Texas and Pacific, in 1882. This was the second transcontinental route.

[14] *Sen. Misc.*, 1875-76, no. 74.

The Texas and Pacific

The Texas and Pacific was the last of the three roads to get in line for congressional favor. The first project for a Pacific railway over the southern fork of the southern route was by a New York corporation styled the Atlantic and Pacific. This was in 1853. The name was changed to Texas Western; then, in 1856, to Southern Pacific. In 1869 a bill to incorporate and aid in the construction of the Texas Pacific was introduced in the Senate,[15] and during the 1870–71 session a similar bill became law.[16] By this act of March 3, 1871, the Texas Pacific was chartered to construct a railway from Marshall on the eastern boundary of Texas, via El Paso, to San Diego, following as nearly as might be expedient the route of the *thirty-second* parallel.

A donation of lands similar to the Atlantic and Pacific grant was made, *i. e.*, twenty, alternate, odd-numbered sections on each side in the territories, and ten in the states. Patents were to be issued as twenty-mile sections of the road were completed. In this charter there was a provision that if any lands were not disposed of within three years they should be subject to entry and settlement.

It is significant of the time that directors were forbidden to contract for construction work, the idea being, of course, to prevent construction rings. Construction bonds and land bonds were authorized, the former not to exceed $30,000 per mile of line.

The capital stock was limited to $50,000,000, and the corporation was authorized to begin when 20,000 shares were subscribed and ten per cent. of their par value paid in. Construction was to begin at both ends; fifty consecutive miles of road were to be completed from each end within two years; the whole must be completed in ten.

The Texas Pacific was authorized to purchase the stock, properties, and franchises of and consolidate with any existing railways along its route, but not with any competing through line to the Pacific. All intersecting railways were given the right to

[15] *Cong. Globe.*, 1868–69, p. 1118.
[16] *Ibid.*, 1870–71, pp. 89, 999, 1185, 1468.

connect and discrimination among them was prohibited. Moreover, "the rates charged for carrying passengers and freight, per mile, shall not exceed the prices which may be fixed by Congress for carrying passengers and freight on the Union Pacific and Central Pacific railroads." Clearly, here, and in the provision concerning construction by directors, there is evidence that Congress was attempting to profit by experience with the Union and Central Pacific lines.

In addition to the section providing for a San Francisco branch to be built by the Southern Pacific,[17] section 22 empowered the New Orleans, Baton Rouge and Vicksburg Railroad Company to connect at Marshall for the purpose of joining New Orleans. This meant a donation of the same amount of lands as the Texas Pacific received for construction within states.

The discussion of the Texas Pacific bill is of great interest.[18] It originated in the Senate, and when it came to the House all after the enacting clause was struck out and an amendment—virtually a substitute—by Mr. Wheeler (N. Y.) was inserted. The name of the line was to be the South Pacific Railway Company. Six branches provided for in the Senate bill were lopped off and the land grant thus reduced from some 26,000,000 acres to 13,000,000 acres. Also the provision for a five foot gauge was altered to merely require a uniform gauge.

The two chief grounds of opposition seem to have been the objection of the South, where there were some 1,200 miles of track having a gauge of five feet, to the non-requirement of a similar gauge for the Texas Pacific, and the scruples of many whose principles had come to be opposed to land grants to railways. The section authorizing consolidations, even though competing lines were excluded, was also the object of heated criticism.

Mr. Garfield voted for the bill on three conditions: it must include no branch or local road; no subsidy of money or credit could be involved; and the company must be prohibited from selling out its franchises and not constructing the road. These conditions Mr. Wheeler affirmed were all met to the best of his ability.

[17] See above, p. 122.

[18] See *Cong. Globe*, 1870-71, pp. 1468, 1632, 1899, 1951.

Mr. Wheeler's summary of arguments for the bill is significant:

1. Common justice demands that the South be placed in equality, as to commercial facilities, with the North.

2. Public economy through retrenchment in military expenditures would be gained; fewer soldiers would be needed and their supplies could be more cheaply transported.

3. The railway would develop the natural resources of the country, increasing its power, wealth, and revenues.

4. Public lands would be enhanced in value.

5. Trade with Mexico would be facilitated.

6. Finally, southern reconstruction would be furthered,—the road would form "another link in the chain which shall make our union indissoluble."

With some minor amendment the bill passed the House, 135 to 70.

Upon returning to the Senate, the House bill—for that was what it amounted to—met considerable opposition, especially from those interested in the various proposed branches. A conference was agreed upon as the solution. As a result the name of the company was made "Texas Pacific;" a New Orleans branch, the New Orleans, Baton Rouge, and Vicksburg, was re-incorporated; and the provision concerning the Southern Pacific of California inserted.

There was a strenuous effort made to include a branch to Arkansas, but to no avail.

Like the Atlantic and Pacific—and the Union Pacific before that—the Texas Pacific charter did not prove entirely satisfactory and was soon amended to give greater privileges. The Texas Pacific constructed only 23 miles in 1871 and none the following year. Then, in 1872, a bill supplementary to the act of March 3, 1871, was passed.[19] By it the name of the company was changed to Texas and Pacific, to indicate that the road was not confined to Texas. And issues of "construction bonds" up to $40,000 per mile were authorized, any lands granted in aid of the road being made eligible as additional security for

[19] *Statutes at Large*, **17**: 59.

such bonds. Thus the power of the company to raise funds by bond issue was greatly increased. All lands acquired through lawful consolidation might be included in the basis for "land bonds."

Furthermore the time for construction was extended by allowing ten years from the date of the supplementary act, instead of the act of 1871.

The act concluded by providing that "upon failure to so complete it, Congress may adopt such measures as it may deem necessary and proper to secure its speedy completion."[20]

Even this was not enough. In 1873 an act was passed to make it lawful that the face value of the bonds thereafter issued by the Texas and Pacific might be either in gold "or in lawful money," at the option of the company; and previous issues specifying payment in any lawful money were declared legal;[21] while in 1874 the company was specifically authorized to secure its construction bonds by one or more mortgages upon all or any part of its line, including the Southern Pacific (Texas) and Southern Transcontinental with which lines it had consolidated.[22]

In 1874 began a long continued and determined effort to secure a loan of the government's credit in the nature of a guarantee of bond interest.[23] The hard times beginning about 1873 made it impossible to construct the road as rapidly as required by law, and between 1876 and 1882 little progress was made. In 1878 the company had partly acquired and partly constructed some 444 miles, extending from Shreveport to Fort Worth and from Marshall to Texarkana, thence to Sherman. Between Fort Worth and San Diego stretched some 1,400 miles, to build a railway over which required new capital. Hence the effort to

[20] For discussion of the bill see *Cong. Globe*, 1871–72, pp. 2567, 2599, 2607, etc. The chief issues were the question as to whether all grants to be made thereafter should be included, whether it was just to authorize the company to raise funds which would be applied to the main line on lands granted for other purposes, and whether if the road were merely projected and not completed the company would have title and if not what would become of the mortgages.

[21] *Cong. Globe*, 1872–73, p. 765; *Statutes at Large*, **17**: 598.

[22] *Statutes at Large*, **18**: 197. The new issues not to exceed previous limits.

[23] See *H. J.*, 1874–75, p. 32; *S. J.*, 1874–75, pp. 29, 30; *Cong. Rec.*, 1874–75, Append., p. 97; *H. Rep.*, 1874–75, index *Tex. and Pacific.*

bolster the company's credit by a government guarantee. One typical bill will illustrate the nature of all.[24] In 1878 the committee on Pacific railroads reported a bill as a substitute for five others which had been introduced and referred to it. After stipulating certain rights and regulations, the bill proceeded to guarantee the interest on the 50 year 5 per cent. construction bonds of the Texas and Pacific to the amount of $20,000 per mile for 1,150 miles and $35,000 for 250 miles through the mountains. As surety, the government was to have a first lien, and might retain its payment for transportation and the entire net earnings of the railway if necessary. Other bills also provided that the company's land grant would be relinquished to the United States in trust, to be opened to settlement and the proceeds to be applied to interest payments and the accumulation of a sinking fund.[25]

Justice to the South, the superiority of the southern route, military economy, and the Mexican market were argued without avail. Congress had learned its lesson, and, there being no national exigency, these bills uniformly failed.

Meanwhile, it must be remembered that the Southern Pacific is occupying the western end of the route and it is being said that that company is ready to extend eastward to El Paso without assistance from the government. Some of the bills proposed that the Southern Pacific should be recognized as the company to construct the road west of El Paso, and to receive a proportionate share of the lands granted to the Texas and Pacific.[26] Such a transfer of lands, however, found little favor.[27] So when the Southern Pacific reached the Colorado and found the Texas and Pacific not only far behind but even struggling with financial difficulties, it built to El Paso without government aid, near which point, in 1872, it was finally joined by the Texas and Pacific.

[24] *Rep. of Com.*, 1877-78, no. 619.

[25] *Cong. Rec.*, 1878-79, p. 13 f.

[26] See *Rep. of Com.*, 1876-77, no. 139. This report sums up the situation well.

[27] The Southern Pacific argued that as an assignee it had a right to the grant, it having been made to Tex. Pac. or "assigns." But the term seems merely to describe the nature of the estate, not to make the grantee an agent of the U. S. to select another to do the work. Nor did the sections authorizing consolidations apply, for they did not apply to a merging of the Tex. Pac. into another corporation.

Thus was opened the second route between the Pacific and the eastern states. In 1882 it became possible to journey from San Francisco, via the Southern Pacific, Texas and Pacific, and St. Louis and San Francisco lines, to St. Louis by rail.

And on October 15, of the same year (1882) the New Orleans branch of the Texas Pacific was opened, making through rail connection between New Orleans and San Francisco. The history of this New Orleans branch is extremely interesting, and is taken up at some length below.

The Texas and Pacific agreed to release its western lands to the Southern Pacific and the latter railway set up a claim to them; but in 1885 an act was passed declaring all lands granted to the Texas and Pacific under the act of March 3, 1871, and acts amendatory thereto forfeited, and restored to the public domain.[28] The company's time for completing a railway from Marshall to San Diego had expired on May 2, 1882.

The Galveston, Harrisburg and San Antonio

As stated above, the Texas and Pacific was behindhand and even upon reaching El Paso the Southern Pacific had found the former's line not yet in sight. It was at Sierra Blanca, 92 miles east of El Paso that the two actually met. These 92 miles were built for the Southern Pacific interests—nominally the Central Pacific—by the Galveston, Harrisburg and San Antonio, and were operated jointly with the Texas and Pacific, each paying half maintenance expenses and the Texas and Pacific paying in addition 6 per cent. on $10,000 per mile.

The Galveston road was the result of knitting together several Texas roads. Beginning with the 80 miles of the Buffalo Bayou, Brazos and Colorado railway, control over the Texas and New Orleans, and Louisiana Western roads was gained, extending the line from Houston to Vermillion. In 1883 Morgan's Louisiana and Texas railroad was acquired, giving access to New Orleans; and on February 1, 1883, this new route from El Paso to the mouth of the Mississippi was opened.

[28] *Statutes at Large*, **23**: 337.

By controlling the Galveston, Harrisburg and San Antonio the Southern Pacific not only got its own road to the Gulf and New Orleans, but also acquired the extensive steamship properties of Morgan's Louisiana and Texas railroad.

The Southern Pacific Company

The next great step in the evolution of the southern transcontinental situation was the formation of the Southern Pacific Company, a Kentucky corporation used as a securities holding company.[29] This company was authorized to buy and hold the securities of any corporation and to make contracts with any railway, steamship, or other public service corporations concerning their ownership, lease, maintenance, or operation. Its authorized capital was $1,000,000, which might be increased, and it might begin business with only $50,000 subscribed and 10 per cent. paid in. Meetings of stockholders might be held in any state, and its offices also, merely the clerk or his assistant must reside in Kentucky. Taxation was practically nominal.

This corporation was formed in 1884 and took over controlling interests in the Southern Pacific companies of California, Arizona, and New Mexico,[30] the Central Pacific, and the constituent corporations of the Galveston, Harrisburg and San Antonio. Needless to say, Stanford and Huntington were the guiding spirits.

In 1880 the Southern Pacific of California had been leased to the Central Pacific for a period of five years.[31] Upon the formation of the company, however, the Central Pacific itself was leased to the company.[32]

The Texas and Pacific did not yoke up with Southern Pacific interests. In 1883 a bill to authorize its consolidation with any company to form a continuous line from San Francisco to the lower Mississippi,[33] *i. e.*, practically with the Southern Pacific, failed; and the Southern Pacific at once obtained a New Orleans

[29] The charter is appended to this chapter as Appendix A.
[30] See above, p. 122.
[31] For a copy of the lease see *H. Exec. Docs.*, 1885-86; **30**: no. 60, p. 2.
[32] *Ibid.*, p. 3.
[33] *Cong. Rec.*, 1882-83, p. 1199.

extension of its own—the Galveston, Harrisburg and San Antonio. The Texas and Pacific became part of the Missouri Pacific system.

The formation of the Southern Pacific Company caused no appreciable stir in Congress. In January, 1886, however, a resolution of general inquiry was passed by the House,[34] according to which the secretary of the interior was to furnish copies of the company's charter, of all contracts or leases between the company and any government-aided road found on file in the department; and of contracts between the Pacific Mail Steamship Company and any land-grant or subsidized railroad. In response thereto a document was submitted[35] which contained a copy of the lease of the Central Pacific to the Southern Pacific Company, and several very questionable agreements between the Pacific roads and the Pacific Mail Steamship Company; but no direct action was taken.[36]

The New Orleans Extension of the Texas and Pacific

It will be remembered that the act of 1871 incorporating the Texas Pacific made a donation of lands for the purpose of connecting New Orleans with Marshall, the eastern terminus of the line. The recipient of this grant, the New Orleans, Baton Rouge and Vicksburg, was a Louisiana corporation formed in 1869 to extend from any point on the New Orleans, Jackson and Great Northern to Vicksburg, and so lying east of the Mississippi. In the year of the grant and in 1873 maps were filed by this company and land ordered withdrawn for it.

Now there is some doubt as to whether the New Orleans, Baton Rouge and Vicksburg—or the Backbone Company, as it was called—seriously intended to build the railway. In any case at the expiration of five years it had done nothing, and by the terms of the grant, it thereby forfeited its right to the lands. In 1877 Louisiana repealed its charter. It would seem that a railway company without rails, lands or charter was certainly a shadow.

[34] *Ibid.*, 1885–86, pp. 897, 925.
[35] *H. Exec. Docs.*, 1885–86, **30**: no. 60.
[36] Must have influenced Interstate Commerce Act.

The interests concerned, however, were not ready to give up the lands, and there ensued as pretty a bit of wire-pulling, log-rolling and high finance as one could wish to see. It was first necessary to maintain a legal existence. To do so suit was brought against the Backbone Company by a bondholder for $215,000. This was on June 4, 1877. On June 11, the company filed an exception alleging that the act of Louisiana repealing its charter was unconstitutional and void: On June 13, the exception was upheld by the court! A case of remarkably rapid justice!

The question involved complicated legal points. The state's charter had provided that the grants and engagements it contained should be a binding contract not to be modified or impaired without the company's petition and consent; while in her general law Louisiana reserved the right to repeal, and in her code (art. 447) was a provision that, for the public interest and upon abuse of privileges or refusal to accomplish its purposes, a corporation's charter might be revoked. The only exception made applied to a repeal which would violate contracts imported in the act and on faith of which money or property had been advanced. Upon this exception and the provision in the charter hung the validity of the court's decision.

Under other circumstances it is probable that the court would have ruled that the charter itself was unconstitutional, in which case it would hardly seem that any contract imported in the charter was violated by the repeal. However that may be, the decision, though criticised, remained.

The question as to retaining the lands granted it by Congress also remained. These had not been declared forfeited; but the time limit had expired. Accordingly in 1877 the Backbone railroad began vigorous pressure to have its time extended. Here it met opposition as follows.

In 1875, a year before the Backbone Company's time expired, the New Orleans and Pacific Railroad Company was chartered by Louisiana to construct a railway to Shreveport or Marshall, Texas, and in a few years actually built to Shreveport. This company's route lay *west* of the Mississippi. The new road almost at once—if, indeed, it was not formed for that purpose—

sought to have the Backbone Company's grant transferred to itself. Its president for several sessions between 1877 and 1880 vigorously denounced the Backbone Company's claims: the above suit was a sham; it was illegal and the company properly defunct.

Little progress was made by either company, and in 1881 came the inevitable,—an "agreement." The Backbone Company for a consideration of $1.00 sold its rights to the New Orleans and Pacific. President Wheelock of the New Orleans and Pacific got sufficient proxies from the other company's president to control a so-called meeting of its stockholders and ratified the sale, he himself voting the proxies which gave his company the lands. The deed was duly accepted by the grantee.

At this point it naturally occurs to one to inquire what was being done to validate the expired land grants, and one wonders at the colossal nerve of the man who could one year give the lie to the claims of a rival company and the next year fight for the same claims. Shortly before the "sale" the commissioner had written the president of the New Orleans, Baton Rouge and Vicksburg, saying, "There can be no doubt that when the president of the New Orleans and Pacific accepts said transfer, the company will be fully invested with all the right, title, and interests which the New Orleans, Baton Rouge and Vicksburg Company has in and to said grant,"—a quit claim, that was all. It was not until 1883 that the interior department, after long delay and under considerable pressure, recognized the validity of the New Orleans and Pacific's claim to ownership of the Backbone grant.

Then the question of forfeiting the grant was raised in Congress. It was argued that the line of the New Orleans and Pacific lay west of the Mississippi, whereas the grant had contemplated a road to the east of that river. Moreover it extended, in 1884, only to Shreveport, while Marshall was forty miles away. On these grounds it was maintained that the conditions of the grant had never been complied with. And the general rottenness and faithlessness of the whole deal favored the forfeiture.

On its part the New Orleans and Pacific came before Congress

arguing (1) that under the terms of the grant Congress had no power to forfeit, (2) that in any case the right had been waived, and (3) that it would be unjust and inexpedient. Chiefly on the last ground, as backed by inertia, Congress took no action to forfeit the grant till 1887. A majority of the numerous committee reports on the subject advised against the forfeiture.

While realizing that it may have been as well to allow the grant to stand on grounds of expediency and leniency toward uninformed third parties, it can not be admitted that Congress had waived its right to forfeit. Mere silence can not in this case be construed as such a waiver; and it is doubtful whether laches can be imputed to our government. The action of the department of the interior, too, was certainly not binding upon Congress.

In the last year of the period Congress finally took action in this matter and forfeited a part of the grant,—the part lying east of the Mississippi and along so much of the New Orleans and Pacific as was completed in 1881.[37] The title to the remaining portion was confirmed to the New Orleans and Pacific on condition that the titles of bona fide settlers were to hold.

RESUMÉ

Thus the southern route to the Pacific was occupied. In 1882 the Southern Pacific joined the Texas and Pacific, and, the latter's New Orleans extension being completed, the second great transcontinental railroad line was formed. The following year the Southern Pacific secured a route of its own east from El Paso via Galveston. In 1883 the same Southern Pacific by constructing its Mojave branch met the tardy Atlantic and Pacific, the first of the roads to be aided by Congress, thus completing the northern fork of the southern route, *i. e.*, the thirty-fifth parallel route desired by Memphis and other interests. This was the fourth transcontinental route.[38]

[37] *Statutes at Large*, **24**: 391 (1887).

[38] The Northern Pacific was opened a few months earlier.

APPENDIX TO CHAPTER IX

A

An Act to Incorporate the Southern Pacific Company

Be it enacted by the General Assembly of the Commonwealth of Kentucky, That Henry D. McHenry, William G. Duncan, Samuel E. Hill, Samuel K. Cox, Henry McHenry, Jr., and their associates and successors and assigns be, and they are hereby, created and constituted a body corporate and politic under the name of the Southern Pacific Company, and as such shall have perpetual succession and be capable in law to purchase, grant, sell or receive, in trust or otherwise, all kinds of personal and real property, to such amount as the directors of said company may from time to time determine; and to contract and be contracted with, sue and be sued, plead and be impleaded, appear and prosecute to final judgments all suits or actions at law or in equity in all courts and places, and to have and use a common seal, and to alter the same at pleasure, and to make and establish such by-laws, rules, and regulations for the government of said company and the conduct of its business as said corporation or the stockholders therein shall deem expedient or necessary for the management of its affairs, not inconsistent with the constitution and the laws of this state or of the United States; and generally to do and execute all acts, matters and things which may be deemed necessary or convenient to carry into effect the powers and privileges herein granted, provided, however, that said corporation shall not have power to make joint stock with, lease, own or operate any railroad within the state of Kentucky.

Sec. 2. The said corporation is hereby authorized and empowered to contract for and acquire by purchase or otherwise, bonds, stock, obligations, and securities of any corporation, com-

pany, or association now existing, or hereafter formed or constituted, and bonds, obligations and securities of any individuals, state, territory, government or local authorities, and to enter into contracts with any corporation, company, or association, individuals, state, territory, government or local authorities, in respect of their bonds, stock, obligations, and securities, or in respect of the construction, establishment, acquisition, owning, equipment, leasing, maintenance, or operation of any railroads, telegraphs, or steamship lines, or any public or private improvements or any appurtenances thereof in any state or territory of the United States or in any foreign country, and to buy, hold, sell, and deal in all kinds of public and private stocks, bonds, and securities; and said corporation may borrow and loan money, issue its own bonds, or other evidences of indebtedness, and sell, negotiate, and pledge the same to such amounts upon such terms and in such manner as may from time to time be determined by the directors of said corporation; and it may mortgage all or any part of its property, assets, and franchises to secure such bonds and the interest thereon, on such terms and conditions as shall on that behalf be prescribed by its board of directors.

Sec. 3. The capital stock of said corporation shall be $1,000,000, divided into shares of $100 each, which shares shall be deemed personal property, and may be issued, transferred, and forfeited for non-payment in such manner as the board of directors of such corporation may determine; and no person shall be in any wise liable as a stockholder of said corporation after said capital stock to such amount of $1,000,000 shall have been paid in, in cash, and a certificate to that effect signed and sworn to by the treasurer and a majority of the board of directors of said corporation shall have been filed in the office of the Secretary of state of this state; nor shall the said corporation, nor any of the officers or agents thereof, be thereafter bound to make any further returns or certificates; *Provided, however,* That if after the payment of such capital stock any part thereof shall be withdrawn for or refunded to any of the stockholders, when the property of the corporation is insufficient or will be thereby rendered insufficient for the payment of all its debts, the stock-

holders receiving the same shall be bound and obliged to repay to said corporation or its creditors the amount so withdrawn or refunded.

Sec. 4. Any two of the persons above named as corporators of said corporation may call the first meeting for the organization of such corporation at such time and place as they may appoint by mailing a proper notice of such meeting to each of such corporators at least ten days before the time appointed, and in case a majority of such corporators shall attend such meetings, either in person or by proxy, they may open books for subscriptions to its capital stock; and whenever $500,000 shall be subscribed, and 10 per cent. of said subscription shall be paid in cash, the stockholders of said corporation may organize the same, and the said corporation may proceed to business.

Sec. 5. Each share of stock shall entitle the holder thereof to one vote in person or by proxy at all meetings of the stockholders. The holders of a majority in interest of the capital stock present, in person or by proxy, shall constitute a quorum. (The corporation shall have a lien on all the stock and property of its members invested therein for all debts due by them to said corporation, which lien may be enforced in such manner as the by-laws shall prescribe.)

Sec. 6. The stock, property, and affairs of said corporation shall be managed by a board of directors of such number, not less than three, as may be from time to time determined by the corporators or stockholders. The directors shall be elected by the stockholders at such time and place and in such manner and for such terms as the stockholders shall from time to time determine. Meetings of directors or stockholders may be held within or without the state. No person shall be elected a director who is not a stockholder of the corporation. A majority of the directors shall constitute a quorum of said board for the transaction of business. The directors shall appoint from their own number a president, and they shall also appoint a clerk and treasurer and such other officers and agents as they may deem proper to hold their offices during the pleasure of the board. In case of a vacancy or vacancies in the board, the remaining directors may fill such vacancy or vacancies. The capital stock of

said corporation may be increased from time to time to such sum as may be determined by the board of directors of said corporation, provided such increase or diminution shall be approved by at least two-thirds in interest of the stockholders of said corporation.

Sec. 7. The annual tax upon said corporation shall be the same as is now fixed by law for brokers' license, provided that all property owned by said corporation and situated in the state shall pay the same state and local tax as is assessed upon similar property, and capital stock in said corporation owned by citizens of the state shall be assessed against the holders thereof as choses in action under the equalization law.

Sec. 8. The company shall keep an office for the transaction of business, and the clerk or assistant clerk of said corporation shall reside within the state of Kentucky, but the said corporation may keep offices at such places outside of this state as in the judgment of its board of directors, its business may from time to time require: *Provided,* That nothing herein contained shall be construed as granting any lottery or banking privileges.

Sec. 9. This act shall take effect immediately upon its passage.

CHAS. OFFUT,
Speaker of the House of Representatives.
JAMES R. HINDMAN,
Speaker of the Senate.
J. PROCTOR KNOTT,
J. A. MCKENZIE,
Secretary of State.

Approved March 17, 1884.
By the governor:

B

AGREEMENT BETWEEN THE SOUTHERN PACIFIC COMPANY AND THE CENTRAL PACIFIC RAILROAD COMPANY, FEBRUARY 17, 1885

"That, whereas part of the through business heretofore done by the Central Pacific Railroad Company's line . . . has been diverted by the Northern Pacific, Atlantic and Pacific, and Atchison, Topeka and Santa Fe; and

"Whereas the Union Pacific Railroad Company has secured the control of the . . . Oregon Short Line, and thereby secured an outlet to the Pacific other than over the Central Pacific Railroad, and thus in that respect placed itself in opposition to the interests of the Central Pacific and

"Whereas traffic is being diverted; and

"Whereas the said Southern Pacific Company has a line of railroad under its control for a period of ninety-nine years, extending continuously from the Pacific Ocean to the Atlantic Ocean; and

"Whereas the lines of each company are doing a large local traffic, and it is important to both that the same should be conducted in harmony; . . .

"Now, therefore, . . . the said Central Pacific Railroad hereby leases to the said Southern Pacific Railroad Company for the term of ninety-nine years from the first day of April, A. D. 1885, the whole of its railroad . . . together with all the rolling stock, telegraph lines, steamboats, . . . and all other property . . ."

And the leases of railways in California and of the Southern Pacific Railroad Companies of California, Arizona, and New Mexico are assigned to the Southern Pacific Company.

On its part the Southern Pacific Company agrees to "operate, maintain, add to, and better" the property, to pay taxes, and return in good condition at the expiration of the lease. The Southern Pacific also agrees to assume and discharge all liabilities of the Central Pacific except (1) the principal of its "floating debt," (2) the principal of its "bonded indebtedness," (3) the principal of all indebtedness theretofore guaranteed by it, (4) the principal of indebtedness evidenced by United States bonds loaned it. Interest on these liabilities will be paid at maturity except on the government bonds, in which case the Southern Pacific Company "will discharge the annual obligations imposed upon said Central Pacific Railroad Company by existing acts of Congress" and will fully comply with the terms of the Thurman act.

"And the said Southern Pacific Company hereby agrees with the said Central Pacific Railroad Company that . . . it will

annually . . . pay . . . as guaranteed rental for said Central Pacific Railroad and other leased property . . . the sum of $1,200,000."

If earnings exceed all expenditures, including the said rental, the excess will be paid to the Central Pacific—not exceeding $2,400,000.

Other paragraphs provided for alteration of the contract if it came to operate to the disadvantage of either party, for arbitration of disputes, for payment for rolling stock of either party used on the lines of the other; and it was further agreed "that if any legislation or governmental action hereafter be had which, in the opinion of the said Southern Pacific Company is in hostility to the said Central Pacific Company, its rights, or the property hereby leased, the said Southern Pacific Company may, on notice to the said Central Pacific Company, terminate this agreement or may submit to arbitrators . . ."

The foregoing contract was signed by W. E. Brown, Pres., and H. C. Nash, Secy., for the Southern Pacific Company; Leland Stanford, Pres., E. H. Miller, Jr., Secy., for the Central Pacific.

C

Agreement between the Transcontinental Association and the Pacific Mail Steamship Company, June 1, 1885

1. The Transcontinental Association[1] guarantees that gross earnings on through freight and passenger service between New York and San Francisco to be provided by the Association shall be $85,000 a month, for 1,200 tons of 2,000 lbs. each way. All the gross earnings of the steamship company on said through traffic shall go to the Association.

2. The Steamship Company will at its own expense run two steamers per month from New York to the Isthmus of Panama,

[1] Composed of the following railway companies: Southern Pacific, Atchison, Topeka and Santa Fe, Atlantic and Pacific, Burlington and Missouri River, Denver and Rio Grande, Denver and Rio Grande Western, Northern Pacific, Oregon Railway and Navigation Company, Texas and Pacific, Oregon Short Line, and Union Pacific.

and two more from Panama to San Francisco; also two steamers from San Francisco to Panama and two from Aspinwall to New York,—and no more. The Association shall fix the rates on all through freight and first class passenger traffic between New York and San Francisco.

3. "The understanding and intention of this agreement is that the party of the first part (the Association) shall, through agents appointed by itself, have entire and exclusive control of all the through business of the said steamship company between New York and San Francisco each way, and that no through freight or passengers shall be taken except at prices to be fixed by the party of the first part and by its consent; . . ."

4. The steamship company agrees not to carry any steerage passengers between New York and San Francisco.

5. The steamship company is to render monthly statements of the amount due, which amount shall be paid by the various railways of the Association as may be agreed among themselves; and each railway shall be liable for its own portion of the aggregate amount alone.

6. This contract goes into force June 1, 1885, and continues for four months from said date, and thereafter until thirty days after written notice by either party. But if the exclusive contract existing between the steamship company and the Panama Railroad Company so far as it refers to traffic between New York and San Francisco, is changed or broken, or if any competing line by water or rail shall be established and affect through traffic, then the Transcontinental Association may at any time terminate this agreement.

7. "The arrangements heretofore made between the Union Pacific Railway Company, the Central Pacific Railroad Company, and the Pacific Mail Steamship Company, in regard to freight and passengers received by the steamship company in San Francisco for transportation to Europe via Panama shall remain as at present, but the party of the first part agrees with the steamship company that the same shall be referred to their respective representatives at San Francisco, in order that if the same is found practicable an agreement may be arrived at be-

tween them on a basis permitting said steamship company to take said class of freight and passengers when . . . it does not conflict with the business of the railroad companies . . . overland."

THE TRANSCONTINENTAL ASSOCIATION.
By L. G. Cannon, General Agent.
PACIFIC MAIL STEAMSHIP COMPANY.
By J. B. Houston, President.

CHAPTER X

THE NORTHERN PACIFIC

It is not the purpose of this chapter to do more than barely outline the congressional history of the railway line which occupied the northern route to the Pacific.[1]

Chartered on July 2, 1864, the road was opened in 1883 and was the third transcontinental route. Its charter was quite similar to that granted the Atlantic and Pacific, embracing a 400-foot right of way and an additional grant of 20 odd numbered sections per mile on each side of its line through the territories and half as much in the states, that is, 25,600 acres per mile through the territories and 12,800 acres through states. The road was to be begun within two years and completed in 1876. No mortgage or construction bonds were ever to be issued without the consent of Congress. Funds were to come from the lands granted and it was planned to raise some $100,000,000 by the people's subscription to the company's stock, the right to subscribe to which was jealously secured to "all the people of the United States," until the entire capital was taken.

As in the case of all the other Pacific charters amendments were numerous. In 1866 a bill to have the government guarantee interest on the company's securities and otherwise further assist it almost passed the Senate;[2] and in the same year a joint resolution extended time for construction two years.[3] Two years later a further extension of a similar period was granted;[4] the

[1] To do more would lead to a large measure of repetition, and the history of the road has been made the subject of an entire volume,—"*History of the Northern Pacific*, Smalley. This may be supplemented by the annual reports of the commissioner of railroads, Poor's *Manual* for 1885, and the following footnote references.

[2] *Cong. Globe*, 1865–66, pp. 3361, 3807, 3866.

[3] *Statutes at Large*, **14**: 355.

[4] *Ibid.*, **15**: 255.

company was to build 100 miles per year after the second year and complete its line by 1877. There was much opposition to this measure and the time extension was cut down and the requirements increased as compared with the original resolution.[5] It was felt that the company was seeking to hold its huge land grant as long as possible in order to secure enhanced values and at the same time continually press upon Congress the question of a subsidy.

The next step on the part of the company was to secure Congress' consent to a bond issue. This was attained by a joint resolution passed in 1869, which authorized the issuance of bonds to be secured by mortgage on the company's railroads and telegraph line.[6] Puget Sound was also interpreted to include all waters connected with the Straits of Juan de Fuca within the United States. Then, in 1870, an act was passed which authorized a bond issue for construction and equipment, having as security a "mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation."[7]

Under this authorization the company proposed to issue $100,000,000 in bonds and actually issued some $30,000,000. These bonds bore the high rate of 7.3 per cent. In 1869 a contract had been made with the banking house of Jay Cooke and Co., which firm had risen into great prominence in connection with Civil War financiering, and through this agency the bonds were slowly disposed of at par, the holdings being widespread. During the three years, 1870–1873, 529 miles were constructed. This meant that construction was rapidly pushed, but the mileage added was not profitable and was by no means able to pay the high interest charges. Thirty million dollars funded debt was too much for less than 600 miles of line to bear. Nor could the company's lands be relied upon to furnish any considerable immediate funds.

Then came the crisis of 1873—partly the result of the prevalence of situations similar to the Northern Pacific's—and the

[5] *Cong. Globe*, 1867-68, pp. 2624, 2689.

[6] *Statutes at Large*, **15**: 346.

[7] *Ibid.*, **16**: 378. For discussion, see *Cong. Globe*, 1869-70, pp. 1584, 2480, 2539.

company defaulted its interest payments, going into the receiver's hands in April, 1875. A vain attempt had been made to induce Congress to guarantee interest.[8] In August a committee representing the bondholders purchased, and a reorganization ensued. The bondholders got 8 per cent. cumulative preferred stock at par.

Thus the bondholders, the real investors—those whom the great stockholders had intended to have little share in the profits and no voice in the management—secured control. There was no Credit Mobilier in the Northern Pacific, but the original stockholders undoubtedly intended to make large profits through their control of the valuable franchise secured by very small actual investments, their plans being frustrated only through the collapse of bond sales, bankruptcy of Jay Cooke and Company,—and the crisis of 1873. The desire of Congress to encourage widespread small stockholdings was not realized, an investigation in 1872[9] showing nominally 184 stockholders with considerably greater concentration in fact. Jay Cooke and Company headed the list with 23,188 shares; J. Gregory Smith came next as trustee for 1,552 shares and holding 934 in his own right; G. W. Cass, J. E. Thompson, and R. D. Rice held 934 shares each. The bonds, on the other hand, were largely purchased by "the people," Jay Cooke's name being one to conjure with.

Bills to extend time for construction failed, but in 1877 work was resumed and the road was completed in September, 1883, the land grant not being forfeited.

Funds had been secured through the issue of 40-year 6 per cent. general first mortgage bonds, of which there were outstanding over $44,000,000 on June 30, 1886.

The history of the Northern Pacific illustrates on a colossal scale the failure of the long cherished scheme of building great railways chiefly by means of land grants; nowhere does the policy more clearly appear as an attempt to put the cart before the horse.

[8] See *H. Misc.*, 1873-74, no. 272. Gives much information.

[9] *H. Misc.*, 1871-72, no. 228. A long, valuable report by the House committee on Pacific railroads on the actual condition of the Northern Pacific.

CHAPTER XI

ISTHMIAN RAILWAY DEVELOPMENTS

The first half of the nineteenth century closed with no railway crossing the narrow land bridge between North and South America,[1] the boats and stages of the Accessory Transit Company between Greytown and San Juan del Sur being the most practicable transportation agency. The Panama route was also used. In 1849 the petitions of Aspinwall and others for a subsidy were not granted, but when, in 1855, they opened the Panama Railroad annual appropriations were made for carrying the mails across the isthmus by this line. The Panama Railroad Company was incorporated in New York in 1849. Its road extended from Aspinwall (Colon) on the Atlantic to Panama on the Pacific, a distance of some 43.75 miles. Constructed chiefly to meet the demand for a route to California, it came to be of considerable importance in trade between New York and San Francisco and in commerce with the Orient.

During the second half of the century agitation for isthmian railways was largely focused on the Tehuantepec route. Inasmuch as no railway was built during the period between 1850 and 1887 there is perhaps small need to dwell on the subject. But during the first four years and again from 1881 on there was some agitation for other railways which may be briefly outlined.

During the 1851–52 session President Fillmore sent a message to Congress in which he spoke of the recent project to connect the Atlantic and Pacific by means of a railway over the Isthmus of Tehuantepec.[2] A convention between Mexico and the United States had been drawn up and had been ratified by the latter.

[1] See *Bul. of U. of W., Econ. and Pol. Sci. Series*, 3: chap. XX, for developments prior to 1850.

[2] *Sen. Docs.*, 1851-52, no. 1, p. 9.

All that was needed for a vigorous prosecution of the work was ratification by Mexico. On this score, however, some difficulty was being experienced, that government appearing to fear territorial aggrandizement by the United States. In his message of December 6, 1852, the president stated that the "rejection by the Mexican congress of the convention which had been concluded between that republic and the United States, for the protection of a transit-way across the Isthmus of Tehuantepec, and of the interests of those citizens of the United States, who had become proprietors of the rights which Mexico had conferred on one of her own citizens in regard to that transit, has thrown a serious obstacle in the way of the attainment of a very desirable national object."

The whole situation is laid bare in a document of the same time,[3] and it indicates that the relations between the governments involved became very strained. A grant of right of way having been made to Don Jose de Garay in 1842, time was extended to him in 1846 by the provisional government of a General Salas. This extension was not held valid by the Mexican Republic and in 1849 Garay was notified that his time had expired. He, however, had proceeded to assign his rights to certain Englishmen who in 1849 turned them over to a United States company headed by P. A. Hargous and New Orleans interests. Early in 1851 a satisfactory treaty was made, but a change in government immediately followed and Mexico persisted in holding the Garay grant null and void and demanded that the treaty with the United States concerning transit over the isthmus be considered apart from the grant. In accordance with this attitude work was suspended and the employees of the company were expelled. The Mexican representative wrote that the Americans had acted "as if the privilege in question had really belonged to them; and in contempt, and almost in derision of the government of the republic, they disposed . . . of the lands, rivers, and woods on the Isthmus of Tehuantepec, and of everything that the government of Mexico possesses there."

On the other hand, Mr. Webster, our secretary of state, main-

[3] *Ibid.*, **10**: no. 97. Correspondence between U. S. and Mexico respecting a right of way across the Isthmus of Tehuantepec.

tained that the action of General Salas in 1846 was a binding contract and threatened Mexico rather openly, though assuring her that her fear lest the Isthmus become another Texas was unfounded. In 1852 Hargous put in a bill against Mexico for property and franchises confiscated.

Then the committee on foreign relations brought in resolutions to the effect that the existing status of affairs was not compatible with the dignity of the United States and suggesting such measures as would "preserve the honor of the country and the rights of its citizens."[4]

In speaking on these resolutions Senator Mason said Mexico's action was not to be taken so much as an indignity as an indication of her imbecility. He pitied her. But the United States owed it as a stern duty to herself to take the action contemplated. We had bought California, and, just as when one buys a field hemmed about by the property of the seller he may have a way in, so we had a right to this short cut to the Pacific.[5]

Senator Seward took the opposing view. He argued that the doctrine that the government should interfere to maintain the contracts of its citizens was limited by the justice and absolute certainty of their rights, concerning which there was some doubt in this case. Under the Mexican constitution the action taken by President Salas could only be exercised by Congress. When we acquired our Pacific possessions we had offered to buy a right of way, but Mexico had refused and we assented to her stand and waived our demands. She was not now refusing transit, but wished to grant it on other terms than the Garay grant, even offering to indemnify Hargous and his company.

Action upon the resolutions was postponed.

Without further detail it may be stated that the Garay grant was not utilized.

The close relationship between transcontinental and isthmian projects is illustrated in a message by President Pierce submitted in 1853. He stated that the great expense, delay, and, at times, fatality attending travel by either isthmian route had demonstrated the advantages of an inter-territorial railway.

[4] *Cong. Globe*, 1852-53, p. 458.
[5] *Ibid.*, append. p. 134.

Accordingly, from about this time the decline of projects for isthmian railways may be dated, moving pari passu with the growth of the transcontinental projects. The Panama railroad, completed in 1855 remained in sole possession of the field.

Not till 1870 was any further project for an isthmian railway brought before Congress, and then a mere resolution for surveying across the Isthmus of Tehuantepec was indefinitely postponed.[6]

Beginning in 1881 came the fight of Mr. Eads, the engineer, for a ship railway at Tehuantepec. In that year Eads secured a 99-year charter from Mexico and brought the subject prominently before Congress until his death in 1887. His charter granted immunity from taxes and a right of way a half-mile in width. Favorable committee reports were obtained, and many prominent engineers and Congressmen were convinced of the practicability and expediency of hauling the largest vessels across the isthmus by rail. A majority of the southern states petitioned in behalf of the scheme. But the various bills for incorporating an Interoceanic Ship railroad or an Atlantic and Pacific Ship railroad uniformly failed to make headway.[7] Eads asked a guarantee of 6 per cent. on $50,000,000 capital stock.

[6] *Ibid.*, 1870-71, p. 2052.

[7] On this subject see Serial no. 1982, Rept. no. 322.

CHAPTER XII

SUMMARY AND ANALYSIS OF THE PACIFIC RAILWAY MOVEMENT

As early as 1834 the Pacific railway idea was conceived. By 1850 men took its ultimate realization for granted. In 1856 it became a political issue, both parties pledging themselves to hasten it, and in 1862 the first Pacific railway charter was enacted by Congress. At that time sectional opposition was simplified by southern secession and the spirit of nationalism became strong enough to down constitutional scruples. Beginning about 1867 hostility toward the Pacific railways became apparent, and about the same time land grants fell into disfavor, so that in 1871 came the last Pacific railway charter.

By 1883 one might have journeyed by rail from the Atlantic to the Pacific over four different routes.

It is to be observed that the later Pacific railways came at an inopportune time, financially. Beginning just prior to the panic of 1873 the various projects suffered severely at its coming; and then, upon getting to their feet, were prostrated by the crisis of 1883–84.

One's first thought upon turning to the subject of Pacific railways is, perhaps, the vastness of the aid given. Surely the ends must have been great and the arguments weighty which could have induced Congress to bestow some 154,000,000 acres of land and advance over $64,000,000 of government bonds.

The purpose of Congress, representing the people of the United States, as expressed on the floors of the House and Senate, was manifold. It varied, too, with the particular line involved. Common to all, however, were the following points.

Just as the constitutionality of the aid was based in no small degree upon the public defense idea, so the military argument

was strong; the various Pacific roads would strengthen the army, decrease costs, and enable the government to deal more effectively with the Indians.

Similarly, the increased economy and efficiency of the mail service was constantly held up as a chief end.

These two objects are frequently expressed in the acts of incorporation themselves, the common phraseology running, "to promote the public interest and welfare by the construction of said railroad and telegraph lines, . . . and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes."

As proprietor of vast stretches of valueless lands the government had much to gain from their exploitation. Railways would open these to sale and settlement and enhance the value of reserved portions. It is notable, however, that this object was less prominent than in the case of the earlier grants and became less and less so; partly, no doubt, because there was less real objection on constitutional grounds, and partly because of bitter experience.

From the inception of the Pacific railway idea trade with Asia was a factor, and when the Texas Pacific was chartered in 1871 it was urged that by its construction another and cheaper route for that trade would be opened. In connection with the southern route the development of trade with Mexico was also discussed. Closely allied with this object or argument was the increase of revenue which might be expected to flow from an increase in dutiable imports.

Finally, union, the binding together of the newly-acquired Pacific territories and the East—the knitting of all the land west of the Mississippi, was an avowed object.

When, after the Civil War, the South clamored for a southern road, justice to that section and assistance in her economic reconstruction were special pleas, together with the Mexican trade. It is interesting to reflect how one line having been established and one section favored, the others made of the fact a purpose or object in constructing a second.

It is interesting also to observe the progression of reasons ex-

pressed for a Pacific railway. At the outset, it will be remembered, emphasis was laid upon oriental and other foreign commerce, the whaling trade, etc. As population in California increased, communication and trade with that outlying possession became a principal reason, while, in the end, the possibility of developing local or way freight was made an important consideration. Thus the end to be obtained came closer and closer home to the road.

The preceding objects or purposes were made arguments, it being assumed by Pacific railway advocates that once the desired railway was built the end would be attained. Against such arguments were marshalled numerous objections, ranging from the hard-headed claim that a railway could not live by through traffic alone down to constitutional theory. It was feared that Congress would fasten upon itself and the nation a system of internal improvements. The land-grant fever rapidly waned after 1862 and the later grants met considerable objection.

Just prior to the war objection was sometimes made to raising the Pacific railway issue on the ground that it would fan sectional strife, but this did not necessarily mean antagonism toward Pacific railways.

The Pacific railway problem lay in the various questions as to the means to be employed in attaining the ends desired. These questions were three in number: kind of aid, route, agency for construction. The last seems to have been first decided, for serious propositions for a national railway ceased in the early fifties. At the same time the necessity for a loan of the government's credit in addition to a grant of land began to be seen and after 1855 bills generally contained a provision for aid in that form. Until the secession of the southern states there was such a divergence of sectional interests concerning the various routes as to make a Pacific railway politically impossible. It seems probable that but for the power of northern capital and a general idea of symmetry the southern route would have been first taken as the one believed to involve the least difficulties in construction and operation. The Civil War put a final end to this probability. At one time, too, it seemed possible to unite on a central route, but the increasing gap between South

and North, together with the growing prominence of the northern route after 1855 dashed this hope. Though conflicting interests existed in 1862 they were not so divergent but that they could be temporarily satisfied by branches from a central eastern terminus.

In the order of their incorporation the Pacific railways were as follows: Union and Central Pacific lines (1862, 1864), Northern Pacific (1864), Atlantic and Pacific (1866), Texas and Pacific (1871). The Southern Pacific received recognition in both 1866 and 1871, and in this connection the Atchison, Topeka and Santa Fe—which received a grant of over 3,000,000 acres—is not to be forgotten. It will be well to examine and compare the provisions of the charters granted by Congress.

In general features the charters are quite similar, the point of difference being emphasized in the accompanying chart. In the earlier acts subsidies were advanced in the shape of loans of government bonds, while the later ones specifically provided that no funds should be given. Rights of way varied from 200 to 400 feet in width, and other donations from 20 to 40 alternate odd-numbered sections per mile. Lands were granted as sections of the roads were completed, the length of section required varying from 20 to 40[1] miles. The general requirement was a beginning within two years and a completion in 12. Time was extended, however, in every case. The capital stock authorized was generally $100,000,000, the Texas and Pacific with $50,000,000 being the only exception. In this case, however,—and in this case alone—bonds were specifically authorized and limited in amount. The Northern Pacific was forbidden to issue bonds without the consent of Congress. In the majority of cases $2,000,000 was to be subscribed and 10 per cent. paid in before business was begun, the variants being Atlantic and Pacific with a subscription minimum of $1,000,000, and Union Pacific which in 1862 was required to have but 1 per cent. paid in ($10 per $1,000 share). Rates were to be fair and reasonable, and no higher for government transportation than for private service of like character. Here again there was not uniformity. The Union Pacific's charter provided that if net earnings should exceed

[1] Original act for U. Pac. changed to 20 in 1864.

I. AID:

1. Land Grants—
(a) Right of way
(b) Other lands

(c) Indemnity li
(d) If not dispos

(e) Price of a
land

2. Subsidy

II. REGULATION:

1. Time—
(a) When lands
(b) For beginnin

(c) For completi
(d) Penalty.....

2. Directors—
(a) Number.....
(b) Qualificatio

3. Capitalization—
(a) Total autho

(b) Par value...
(c) Subscription
(d) To be paid i

(e) Maximum n

4. Rates—
(a) Governmen

(b) General.....

5. Consolidations.

6. Connections.....

7. Discrimination

8. Character of ro
(a) Gauge

(b) Rails.....
(c) General....

*Figures in br

10 per cent. Congress might reduce rates and the act creating the Texas and Pacific stipulated that rates were not to exceed those fixed by Congress for the Union Pacific.

It is notable that all the acts of incorporation required more or less frequent amendment, almost seeming to have been regarded rather as entering wedges than as ultimate enactments.

In answering the question, were the purposes with which the Pacific railways were constructed actually realized some consideration is necessary. When one thinks of the corruption, litigation, and loss involved, doubt arises. Military advantages were gained; the postal service was extended and its efficiency increased; lands were sold and settled. But at what cost? The conclusion seems inevitable that the gross gain was less than anticipated, while a net gain is doubtful.

For one thing there was much friction between the government and the railways concerning rates and service in the transportation of the mails, and troops and military supplies; and the rates obtained were not as low as were hoped for.

Again, the Asiatic trade did not prove to be of any considerable importance to the transcontinental railways, and the glowing hope held forth concerning it can not be said to have been realized.

A question upon which a decision largely depends is, When would the communications have been opened and the lands settled had the Pacific railways not been built? Perhaps no very definite answer can be made, but it seems certain that within two decades private enterprise would have sufficed. It is not clear that the grants of land were of very great assistance to the railways during the period of construction. Constant demands for funds, failures, and receivership came in spite of them. The companies were ever ready to surrender their lands as security for sinking funds or to gain loans of government credit.

Furthermore, it is sometimes forgotten that several different railways and land grants were involved. It is probably true that the Union Pacific-Central Pacific route—one road to the Pacific—was so urgently needed for political reasons that the act of 1862 was wise. But it seems that one great transcontinental line would have accomplished the purpose and private initiative

supplied the others. Can anyone doubt that such roads as the Southern Pacific and the Santa Fe would have done their part?

Certainly the West was gridironed with transcontinental routes sooner than if no aid had been given; certainly settlement was more rapid; but that haste may make waste, both for men and nations, was illustrated on a gigantic scale, and when the balance is struck the policy is found wanting. It is generally conceded that too much aid was given, but it is to be emphasized that this may mean too many lines were aided, as well as that too much aid was given to any one.

Without standing for government ownership as a general policy, the question may be raised whether in this case our government might not have built the first Pacific railway with relative profit. As opposed to the policy of assistance which was adopted and administered it would seem simpler. Here private interest ran amuck and the tardy light of publicity only guided the historian. Economic waste and political corruption were rife, while constant litigation injured both railway credit and national dignity.[2] In the light of history it may reasonably be maintained that the United States would have best solved the Pacific railway problem which confronted it in 1860 by constructing a national railway over the central route, leaving to private initiative, aided only by adequate rights of way and materials, the exploitation of secondary lines.

[2] In 1886 and 1887 bills were introduced—and passed by the Senate—to prohibit congressmen from acting as attorneys or employees of railways chartered or aided by the government. This was done on the ground that the government's interests were suffering. The debate was filled with insinuations and innuendos, and was very disgraceful. (*Cong. Globe*, 1886-87, pp. 1127, 1344, 1360.)

BOOK III

REGULATION OF RAILWAYS

PART I

RESTRICTION AND REGULATION NOT BASED PRIMARILY ON THE "COMMERCE CLAUSE"

CHAPTER XIII

RAILWAYS AND THE PUBLIC DEFENSE

As a general thing, when an act of Congress has declared a railway or a railway bridge a post route it has at the same time made it a military route, and, nearly always, a provision for reasonable mail service has been accompanied by one for transportation of troops and munitions of war free or at reasonable rates. A great exigency like the Civil War called forth the exercise of great control over railways; while ever, though to a far less degree than in European countries, the contingency of war, leading to constant preparation for the public defense, has had more or less influence in molding the relations existing between our government and the railways.

Railway Affairs During the Civil War

The outbreak of the Civil War at once brought problems of transportation. Early in the conflict the resistance to the passage of Union troops through Baltimore, the destruction of the bridges of the Wilmington and Baltimore, and the refusal of the Baltimore and Ohio to transport troops and supplies, involved— as the secretary of war reported in 1861— the necessity of seizing such parts of railway lines as were essential to

unbroken connection between Washington and the North.[1] The secretary recommended "the propriety of an appropriation to be made by Congress, to be applied, when the public exigencies demand, to the reconstruction and equipment of railroads, and for the expense of maintenance and operating them." And in the same strain, President Lincoln advocated that Congress provide for the construction of a railway, on the ground that military expediency demanded such a connection between the loyal regions of Tennessee and western North Carolina, and Kentucky.[2] The route of the road would be determined by Kentucky and the general government in co-operation, and, the work would be, to use the president's words, "not only of vast present usefulness, but also a valuable permanent improvement, worth its cost in all the future." Thus, in this case, ground was taken far beyond immediate military expediency. War was on, and, with a western man at the head, the executive branch sought unwonted power over railways as a necessity for its efficient prosecution.

The President Authorized to Take and Operate Railways

Nor was the legislature slow to sanction the extraordinary power demanded. In the following year, 1862, an act was passed to authorize the president of the United States in certain cases to take possession of railways and telegraph lines. Under this measure the president was authorized, whenever, in his judgment the public safety required, to seize any or all railway or telegraph lines in the United States, their offices and appurtenances; and to place under control the officers, agents, and employees so that they should be considered a part of the military force of the United States, subject to all the restrictions imposed by the rules and articles of war. Three commissioners appointed by the president, by and with the consent and advice of the Senate, were to determine damages and compensation due any company as a result of the operation of the act, their decision to be final. All transportation of troops and military

[1] *Exec. Docs.*, 1861, no. 1, p. 25.
[2] *Annual Message*, Dec. 3, 1861.

supplies and property was placed under the immediate control of the secretary of war and his agents.[3]

When the bill was up in the Senate, Mr. Wade (O.) explained that it was merely a war measure. In the course of the war railways would inevitably be needed whose management would be hostile and it would then be necessary to seize and hold them. It would not affect any road whose owners were loyal and willing to let the government use it. He supposed that under the war power the executive might do all this without such an act, but that it was much better "that it should be done by authority of law than by what may be considered by some as an usurpation."

That there were some who so considered it is manifest from the remarks of Mr. Pearce (Md.) which followed.[4] It seemed to him that this bill was a very extraordinary one; it had taken him by surprise;—and he then launched into a defense of the Baltimore and Ohio Railroad Company, which plainly shows that the bill was considered as largely directed against that road. The lines from Philadelphia to Baltimore and from Baltimore to Washington had, according to his statement of the case, acted with exemplary patriotism and efficiency. What necessity was there for the government taking the whole of this vast property involving over twenty-six million dollars, and subject to a thousand difficulties and inconveniences? Having become the owner of the road what provision would the government make for transporting commercial tonnage and for the payment of interest on the road's funded debt?

The bill passed the Senate, 23 to 12, and the House favored it, 113 to 28. A majority of New England's votes favored the measure, and, with the exception of Illinois and Iowa, the West supported it strongly. The middle states were divided. Kentucky cast her two votes in the Senate against the bill.

Evidently, however, there were misgivings over the passage of so strong a measure, for at the same session a joint resolution was passed which placed certain limitations upon the power of the executive under the act.[5] It was not to be so construed as

[3] *Cong. Globe*, 1861-62, p. 506.
[4] *Ibid.*, p. 508.
[5] *Ibid.*, p. 3274.

to authorize the construction of any railroads, or the completion of any line of road, the greater part of which remained uncompleted at the time of the approval of the act, or to engage in any work of railroad construction; and so much of the act as authorized the president to extend and complete any railroad was repealed. It is probable that there was some ground for this action, for a document of this time suggested that the act authorizing the president to take possession of railways might be made the nucleus of a comprehensive system of government railways.[6]

Requests and Proposals for Government Aid

Such being the need of the government for greater transportation facilities it is not surprising that steps were taken, not only to take over existing railways, but also to aid the construction of new ones. Almost at the outbreak of the war came the following proposition from the Metropolitan Railroad Company.[7] The company asked assistance in constructing a new through line from Washington to New York via Baltimore by means of an extension to connect with the Philadelphia and Wilmington or Northern Central of Pennsylvania, which extension would also open connections with the West. During the continuance of the war this line would be placed at the disposal of the government for the transportation of troops, military supplies, and the mails at reasonable rates. The petition stated that the Baltimore and Ohio was charging an average of 6.5 cents per ton mile for government freight, and nearly 4 cents a mile for passengers, while the Metropolitan company was limited by charter to 4 cents per ton per mile for freight and 3 cents per mile for passengers, and would only charge the government a minimum of 2 cents a head per mile. In return the government would loan its credit to the amount of $2,000,000 in guaranteeing the company's bonds or in the form of United States bonds, this advance to be secured by mortgage on the company's property.

Nothing came of this memorial.

[6] *Sen. Docs.*, 1861-62, 5: no. 32.
[7] *H. Misc.*, 1861-62, no. 65.

At the next session the memorial of S. P. Case in behalf of the Reading and Columbia Railroad Company was presented.[8] The new construction involved consisted chiefly in an eighty mile branch from Washington to connect with the Columbia and Reading and so join the capital with New York and eastern and northern points. A long series of objections against a government railway were presented, as the great and inopportune expense; the fact that such a road would run but a few miles distant from existing lines; "and lastly, it is never good policy for the government to enter upon a system of internal improvement, however vital to the functions of government, if the ends of government can be subserved by a judicious intervention of private enterprise." Coupled with this line of reasoning was a strong statement of the evils of the present service between Washington and New York, in which monopoly had brought about high fares and poor accommodations.

The bill (S., No. 508), which was introduced, provided for 2½ cent fares and reasonable rates, preference to be given to government supplies. It failed of passage.

During this same session the committee on military affairs reported favorably on a memorial of the corporation of Washington in behalf of a line from that point to Pittsburg.[9] The helplessness of Washington, dependent as it was upon a single road, was dwelt upon, and it was stated to be an important consideration that this would form the shortest connection with the Pacific railway just authorized. A guarantee of bonds was the form of aid asked.

Another means of solving the problem was proposed in a bill the object of which was to enlarge the powers of existing railways and condemn property for their use.[10] The bill declared the several lines between New York and Washington via Philadelphia and Baltimore to be military and postal roads in the service of the United States; and for the purpose of securing a more safe, speedy, and economical transportation of troops,

[8] *Sen. Misc.*, 1862-63, no. 26.

[9] *Sen. Rep.*, 1862-63, 1: no. 81. This project differs from the others mentioned in that they concerned a road from Washington to New York. No aid was given.

[10] *Cong. Globe*, 1861-62, p. 2108.

munitions of war, and mails, the railways were authorized to make such branches and changes of location as should be necessary to improve connections in Philadelphia and Baltimore, to establish ferries and bridges, and to use steam power on all portions of their lines. These powers were to be subject to the secretary of war, and compensation made to any person or corporation suffering damage by having property taken under the act.

This bill was favorably reported in the House by the committee on roads and canals, but was laid on the table by a vote of 76 to 43.

Government Railway Proposed

Another phase of the same matter is presented by proposals for a government railway from Washington to New York,—the means argued against in the document favoring the Reading and Columbia project. A select committee appointed by a resolution of the House reported in favor of such a plan,[11] on the ground that, while the traffic was sufficient to warrant at least two railways and governmental and commercial wants required more than one, it was unlikely that the states concerned would ever charter another railway company. It seemed to the committee both necessary and expedient "that Congress should interpose, in proper exercise of its constitutional authority, to correct existing evils, promote the public welfare, and lessen the embarrassments of the public service;" and they recommended that Congress authorize the establishment of a postal and military railroad, the schedules and rates of which should be so limited as to secure priority and preference to the government when dispatch should be required, and the road be always subject to "proper" government control. The government was to be "officially represented in its management, have supervisory direction of its location, of the basis of its finances," etc.,—in short, the road would have been primarily the agent of Congress.

At a later session a similar bill provoked a strong negative

[11] *H. Rep.*, 1862-63, no. 63.

speech by Mr. Thomas (Md.).[12] Mr. Farnsworth (Ill.) had upheld the constitutionality of the bill, to which the representative from Maryland could not agree. He went back to the times of Jefferson and Madison and cited Monroe's veto of the bill for erecting toll gates on the Cumberland road.[13] He held that the bill practically created a corporation within the states, whereas the government had no power to establish a corporation within the limits of a state. "If this be not interfering with the reserved rights of the states, then the states have no reserved rights, and this is a consolidated government." Moreover, he charged the supporters of the bill with an unwarranted attack on the Baltimore and Ohio railroad, made in the interest of the Northern Central railroad of Pennsylvania; and he demanded in the name of justice that Maryland be reimbursed if she was to be deprived of the value of her investment.

These proposed bills and the debates upon them indicate that the struggle over the power of the federal government under the constitution was carried on all during the Civil War and that railways were involved. There was a great upheaval of nationalism, and, of course, the withdrawal of southern congressmen meant the weakening of the states' rights element. In 1866, when a bill to authorize the construction of national railroads and to establish the same as military and commercial highways[14] was under consideration in the House, Senator Morrill (Me.) took occasion to decry the nationalistic spirit of the time.[15] The bill evidently provided for a "Bureau of National Railroads" and a "Comptroller of the National Railroads;" and proposed to authorize any five or more persons to become incorporated to build a railway in any direction. Mr. Morrill repudiated state sovereignty but believed the measure violated the reserved rights of the people [of the states!]. His remarks are worthy of quotation in this connection: "Now, sir, to show that there is some danger on this subject, and that I do not misapprehend

[12] *Cong. Globe*, 1864-65, p. 911. Bill to facilitate railway communications with the capital.

[13] See *Bul. of U. of W., Econ. and Pol. Sci. Series*, 3: 331; reprint, vol. I, p. 165.

[14] *Cong. Globe*, 1865-66, p. 1857. Introduced by Mr. Garfield (O.); postponed.

[15] *Ibid.*, p. 2852 seq.

the tendency of the times and the tendency of the doctrine which is contended for . . . as to the power of the government to build railroads and canals in the several states and to fix the tolls and rates of freight and fares upon exising roads, let me call the attention of the Senate to what is transpiring in this very Congress in this direction as illustrating the dangerous tendency of this power and the extent to which it is proposed to carry it. I have before me a bill . . . with this significant title . . . a bill to establish national railroads! . . . Why, sir, it may sound well to talk of a national railway system! The term has a large sound I admit; and if we were in imperial France or in the Russias, I could understand how such a bill as that could be introduced. . . . I hesitate to believe that the government of the United States either has the power to exercise any such functions or that it is at all expedient to exercise them if it had." And he went on to refer to the tendency to do everything in a *national* way, saying that nothing was held legitimate in those times except it had the indorsement of nationality.

The war marks an important development in the national life of the United States, and, incidentally in the development of railway control. It is no mere coincidence that from that time on the movement for railway regulation increased,—culminating in the Inter-State Commerce Act of 1887. In the sixties the forces of *laïsser faire* and narrow interpretation of federal power—the former being practically the economic synonym of the latter—were shaken; and the central government's hands were strengthened to deal with inter-state commerce. The only wonder is that during the fever heat of nationalistic reaction some of the bills regulating railways were not passed. Diverse sectional interests, and, more especially, the presence in Congress of many men of the "old school," politically and economically, prevented.

During the six years immediately following the war at least six different bills were introduced in Congress, the titles of which read, "to facilitate commercial, postal, and military communication," "to promote commerce and cheapen transportation of military and naval stores," etc. Supporters of bills to

regulate commerce were accused of using the power to raise and support armies and the popularity of war measures to cover the unconstitutionality of their proposals.

Poor and Inadequate Railway Facilities at Washington

It will have been noticed that most of the railway projects which Congress considered during the war were directed toward establishing better communication between Washington and the East and North. That Washington was inadequately served by the single railway which connected it on the east was a sore complaint of congressmen and residents; and the war, adding national military necessity to private annoyance, brought this complaint to a crisis. In 1862, the committee of the Senate on roads and canals reported that "a more disagreeable, annoying, and unsatisfactory line of railroad, for the length and importance of it, is not to be found in the United States."[16] It commonly took from twelve to fourteen hours to make the trip from New York to Washington, whereas seven to nine hours should be enough. Changes of cars and failures to make connections made the trip unpleasant and uncertain, and, on such a route, assumed the proportions of a national wrong. At about the same time a House committee referred to the need for more than one route, especially when that one was controlled by "a powerful, if not objectionable monopoly."[17] The rates were also high, running from 5 to 8.5 cents per ton mile for government freight.[18]

The complaint on this score was long continued, and even after the Pennsylvania gained access to Washington in 1867[19] many bills for chartering railways from Washington were introduced.[20] Some of these were for the establishment of "military and postal roads."

[16] *Sen. Misc.*, 1862-63, no. 26.
[17] *H. Rep.*, 1862-63, no. 63.
[18] *H. Misc.*, 1861-62, no. 63.
[19] See below, p. 193.
[20] *E. g.*, *Globe*, '68-'69, p. 203; Ib., '70-'71, pp. 332; '70, 1807; 380, 1187.

The War Benefited Northern Railways

It is well known that the war stimulated some industries, and this is true of the transportation industry. Railway interests in the North were benefited by the war, which meant a great demand for the movement of troops and supplies. It was remarked in Congress during the middle of the war period that the railways had profited exceedingly by the condition of the country.[21] The commerce of the Mississippi was interrupted and the competition of southern railways stopped, while the demand of the East for food stuffs was great. The anthracite roads also enjoyed great prosperity. The reverse was generally true in the South.

Indebtedness of Southern Railways

At the close of the war the government found itself in possession of railway rolling stock and other property to the value of some $7,569,000[22] which had been taken under executive orders, and the proper disposition of this property proved to be a problem. The method adopted was to divide it among the various southern railways taking their bonds for payment.[23] These bonds bore 7.3 per cent. interest. Evidence was later brought before Congress that the southern roads made these purchases in 1865 under the delusion that full payment of their bonds would not be exacted, that they would be allowed credit for the use and damage of their property between the cessation of hostilities and the time of sale, and that they would be paid full rates for government transportation.

The companies of the Atlantic states paid their debts promptly partly in cash installments, partly in mail and military services. The southwestern roads, however, and especially those of Tennessee, resisted payment, alleging that they were

[21] *Ibid.*, 1863-64, p. 1851.

[22] *Rep. Sec'y of War*, 1870-71, p. 149.

[23] The southern roads were practically stripped of rolling stock and this could not be used on northern roads because of the prevailing difference in gauge.

compelled by military order to take property they did not want and to pay exorbitant prices for it. They also put in claims for damages and past services, and finally besought Congress to abate their debts.[24] Meanwhile suit was brought against the companies. The advisability of this litigation was very questionable. Even if successful there were claims prior to those of the government, while members of Congress referred to court decisions as involving "many inconvenient and doubtful questions concerning the rights which capture vests in the United States, the obligations of the government to owners of property taken and used during the war, the validity and force of bonds and agreements executed under alleged military coercion, and other questions of similar character and gravity." To prevent this undesirable adjudication and settle matters, an act was passed in 1871 authorizing the secretary of war to compromise the matter upon such terms as might be just and equitable, and best calculated to protect the interests of the government.[25]

Though a number of cases were settled under this act by lowering interest rates, extending time, etc.,[26] it by no means remedied the situation. The reports of the secretary of war for the next two years show an *increasing* indebtedness due to failure to meet interest payments. During the fiscal year ending June 30, 1872, the accruing interest and expenses exceeded the payments by $10,091. In at least one case the railway became bankrupt and was sold under the first and second mortgages, in which case recovery was found impossible. Especially aggravating was the refusal of railways to apply earnings from the mail service to the payment of their debts, the secretary of war reporting that this was done "because the present owners refuse to assent to such application"(!).[27] Accordingly he recommended an act to enable the war department to collect the postal earnings of delinquent railways direct from the post office department.[28]

In 1875 an act to extend the act of 1871 to provide for the

[24] *Cong. Globe*, 1870-71, p. 1831 seq.
[25] *Ibid.*, p. 1862, 1876.
[26] See *Exec. Docs.*, 1873-74, no. 70, and *Rep. of Sec'y of War.*
[27] *Rep. of Sec'y of War*, 1872-73, p. 148 ff.
[28] *Ibid.*, 1873-74, p. 8.

collection of debts from southern railways was passed.[29] The secretary of war and the attorney general were jointly authorized to settle claims against certain defaulting railway companies. They might abate the claims not to exceed 25 per cent. of the value of the property, provided settlement was made within one year from the passage of the act. Meanwhile the companies were to be prosecuted. Under this act some of the worst cases were speedily compromised.[30]

It will have been already observed that the passage of these acts of 1871 and 1875 might be regarded as discriminatory and as putting a premium on the dishonesty or poverty of the defaulting roads. Such complaint was made in Congress and little opposition was made to a bill reported by the Senate committee on military affairs[31] to authorize the reopening of the settlement made with the Western and Atlantic Railway of Georgia and to make a settlement on the basis adopted with the Tennessee roads.[32] For several successive sessions thereafter bills were introduced, the gist of which was to apply this act to all the indebted southern roads which had made payment before the act of 1871. No such bill was passed, however, and it would seem just to regard the compromise acts of '71 and '75 as necessary adjustments of bad debts rather than favors granted to a few roads, though the House committee on judiciary in a report made in 1878 takes the opposite view.[33]

Other Military Relations

The ordinary relations between the government of the United States and the railways on the military score may be briefly mentioned. Considerable payments have been made for the

[29] *H. Jr.*, 1874-75, pp. 474, 613; *Cong. Rec.*, 1874-75, index to bills, H. bill 1938.

[30] See *Exec. Docs.*, 1875-76, no. 57.

[31] *Sen. Rep.*, 1875-76. no. 225.

[32] Act of Mar. 3. 1877. This railway was owned by Georgia. It was claimed that the United States owed it for transportation after the war and for about 14 miles of rails taken away. See *H. Miss.*, 1871-72, no. 209.

[33] *H. Rep.*, 1877-78, no. 909. Gives a good resume of the subject. It is argued that the southern roads were all in the same financial condition and so the debts of some were not "worse" than others.

transportation of troops and supplies during times of peace.[34] There is constantly the necessity for moving troops and transporting supplies, and payment is made, with the exception of certain land-grant roads.

The provision in the act of 1870 granting land to the Utah Central railroad is typical of such exceptions; it provides that the railway "shall be a post route and a military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose, restricting the charges for such government transportation."

In an act making appropriations for the support of the army passed in 1874, Congress enacted that no part of the money appropriated should be paid to any company for the transportation of property or troops of the United States over any road which, in whole or in part, was constructed by the aid of a land grant made with the condition that the railway should be a "public highway for the use of the government of the United States free from toll or other charge," or upon any other condition for the use of the road. Another act passed the following year making appropriations for deficiencies contained a similar provision.[35] The former act was construed by the solicitor general in an opinion approved by the attorney general to prohibit payment to any land-grant railway, including some which had before that received full compensation.[36]

In some cases railways have refused to transport military supplies and troops. Among these were the St. Paul and Pacific, Hannibal and St. Joseph, and Morgan's Louisiana and Texas Railroad.[37] These were roads aided by grants of public land and liable, as Congress claimed, under the conditions of the grant to carry troops and military supplies free of charge.[38] In the case of Morgan's Louisiana and Texas railroad it was

[34] *E. g.*, see *Rep. of Sec'y of War*, 1871-72, **1**: p. 203; and *Exec. Docs.*, 1873-74, no. 252, which gives extensive detailed list of railways and amounts paid.

[35] *Statutes at Large*, **18**: 443.

[36] See *Rep. of Sec'y of War*, 1874-75, p. 170.

[37] See *Exec. Docs.*, 1874-75, no. 94. This interpretation overthrown by the courts in 1876.

[38] But see above, p. 35 f.

claimed that the road had never profited by the grant, that it had been declared forfeited in 1870, and that Mr. Morgan had purchased the road after the war at United States Marshal's sale free of incumbrances. There was much correspondence over the matter in the course of which the quarter-master general proposed the use of force.[39]

Bills have been introduced to aid the building of military, commercial, and postal railways connecting military posts;[40] and acts have been passed making certain railways military roads.[41] During the trouble with Mexico, which occupied Congress at its 1877–78 session, propositions of the former description were numerous, there being bills to authorize the secretary of war to contract for the construction of a railway as a coast defense and commercial and military highway, reduce the cost of defense of the southwesterly boundary of the United States by the construction of a railway and telegraph, etc.[42] In this connection it is not to be forgotten that the Pacific railways were aided by the government on grounds which were partly military.

In the surveying of the Pacific railways interference by the Indians made military protection necessary, and military posts were requested by the Northern Pacific.[43]

Summary

Naturally the single war which occurred between 1850 and 1887 is the salient feature of an account of the railways in relation to public defense between those dates. The crowning event was the passage of an act authorizing the president to seize and operate railways when needed for military purposes, though power to build new lines was expressly denied. During the war several requests and proposals for aid to private roads and for the construction of government roads were made, all of which were refused. Nevertheless the debates of the time make

[39] *Ibid.*, p. 6.
[40] *H. Jr.*, 1877-78, pp. 390, 679, 1070; *H. Jr.*, 1877, p. 275.
[41] *Statutes at Large*, 16: 396, 578.
[42] For a review of the situation see *H. Misc.*, 1877-78, no. 46.
[43] See *Sen. Docs.*, 1872-73, no. 16; and *Exec. Docs.*, 1872-73, no. 213.

clear the existence of a wave of nationalism which threatened to rapidly break down constitutional barriers against government regulation.

During the war the inadequacy of railway facilities at Washington became very glaring and led to much unfavorable comment, but no action was taken.

At the close of the war the southern railways became indebted to the government for rolling stock, and for a number of years their inability or unwillingness to pay their debts caused friction.

The ordinary military relation between government and railways has been one simply of payment for service, complicated by provisions for reduced rates on land-grant roads; and proposals to build military railways have been rejected.

CHAPTER XIV

THE FEDERAL GOVERNMENT AND TAXATION OF RAILWAYS[1]

The chief instance in which the federal government has taxed railways occurred during the Civil War and was a war measure. In that exigency, demanding great revenue, the railway business was turned to for fiscal purposes, just as income taxes, stamp duties, licenses upon occupations, and other unwonted taxes were resorted to. As being a business preeminently inter-state in character,—one which the separate states could only with difficulty assess,—the railways of the nation were well suited for federal taxation.

The Revenue Bill of 1862

Accordingly, on July 1, 1862, an internal revenue bill[2] was passed which levied a tax upon the gross earnings from the passenger service of railways and other transportation agencies, and upon railway dividend and interest payments. Section eighty concerns railways, steamboats and ferries. It enacted that, after August 1, 1862, the owners or managers of any steam

[1] This chapter on taxation has been included in the book on Regulation, not because we regard taxes as regulation of railways analogous to rate regulation, for example, but because of its close connection to the preceding chapter, and because of the fact that taxation falls more nearly under regulation than under aid,—being, in a sense, a restriction upon the private use of railways.

[2] "The guiding principle of the internal revenue of July 1, 1862, was the imposition of moderate duties upon a large number of objects rather than heavy duties upon a few. It included rates upon luxuries, represented by spirits, ales, beer, and tobacco; licenses upon occupations; duties upon manufactures or products; upon auction sales, carriages, yachts, billiard tables, and plate; upon slaughtered cattle, hogs, and sheep; upon railroads, steamboats, and ferry boats, railroad bonds, banking institutions, and insurance companies;" upon income, legacies, together with numerous stamp duties. (Dewey, *Financial History of United States*, p. 301.)

railway or steam vessel should pay a duty of 3 per cent. on the gross amount of all the receipts for the transportation of passengers; and that railways not using steam power and ferry boats should pay 1½ per cent. Monthly reports of gross earnings from the passenger service were required, the accrued duties to be paid at the same time. For the purpose of making assessment or of ascertaining the correctness of returns the books of the company were to be open to government inspection, and fines were provided for neglect or evasion. And the section contains this significant proviso: "That all such persons, companies, and corporations shall have the right to add the duty or tax imposed hereby to their rates of fare . . . any limitations which may exist by law or by agreement with any person or company which may have paid, or be liable to pay, such fare to the contrary notwithstanding."

The provisions concerning the taxation of railway interest payments and dividends are contained in section eighty-one, headed, "Railroad Bonds." Any railroad company having a funded indebtedness payable in one or more years after date, on which interest was to be paid, should pay 3 per cent. on such interest; and all railways were made subject to a like duty upon all dividends in scrip or money, the company being authorized and required to deduct an amount equal to this duty from payments to bond and stockholders. Reports were to be made to the commissioner of Internal Revenue as often as every six months, and fairly heavy penalty clauses were added.

Thus the salient features of the act are, a tax on *gross* earnings from *passenger* services, the rate being higher for steam than for street railways; and a tax on interest and dividend payments. The latter part of the measure is clearly part of the income tax scheme. The proviso that rates might be raised in proportion to the gross earnings tax regardless of existing legislative or contractual restrictions is significant as overruling the maximum rate provisions of certain states—*e. g.*, New York—and shows that the tax was looked upon, not as being levied primarily upon the railways, but as being borne by travellers.

The Debate on Taxing Railways

The debate on this bill was a long one and throws much light upon its meaning.[3] Among the first points contested was the rate of taxation for street railways.[4] The original proposal was a 3 per cent. rate, the same as for steam roads; but, on motion of Mr. Horton (O.), this was reduced to 1½ per cent. in the House; and, though the Senate committee first favored the higher rate, the lower was finally adopted. Senator Fessenden (Vt.) explained that in the case of street railways and ferries the tax could not be added to the fares charged; they could add no less a sum than one cent, while "one gentleman stated . . . that if they added one cent to the fare, in order to raise a tax of $10,000, they would take $50,000 from the community." So it was not a knowledge of monopoly price that actuated congressmen, but the (probably) mistaken notion that rates would be raised disproportionately to the tax. As already observed, it was the intention to allow rates to be raised in proportion to the tax rate, thus shifting the incidence of the tax to consumers of the transportation service; and when the interests concerned objected that the least possible increase in rates of fares meant an advance of over 3 per cent. they made their case.

It is interesting to notice that, assuming the same intention as to the incidence of the tax, quite a different argument based upon the impossibility of shifting a tax on gross income when the highest net returns are being received, would have led to the same result, and would have been the economically sound one, for in such a case the street railways could not shift the tax by raising rates without diminishing their returns, and this would have defeated the purpose assumed as truly as would a disproportionate payment by consumers. Such an argument, however, could not have been effective with so hungry a Congress, and to confess to a monopoly would have then been even more bold than at present.

Mr. Conkling (N. Y.) objected strenuously to the lower rate

[3] See *Cong. Globe*, 1861-62.
[4] *Ibid.*, pp. 1480 ff., 2331 ff.

in the case of horse railways, believing that they were more profitable than steam railways,—which is obviously beside the point if the tax was to be shifted.

Another main question concerned the inclusion of freight earnings in the tax. This idea was rejected, apparently on the ground that the railways could not afford it, that it would be difficult to assess it, and that it would discriminate against them in their competition with untaxed water carriers. Mr. Blair (Pa.) argued strongly for the "tonnage tax;"[5] everyone consumed things which had been transported and no tax would rest more gently and equably upon the people, while he looked with great favor on the travelling habits of the people and deplored any measure which would hinder mobility. On this point the words of Mr. Horton (O.) are interesting in their naivite: "The provision of the bill simply charges a person for travelling," he said. "If he does not travel he pays no tax; if he travels on business he can afford to pay the tax; and if he travels for pleasure, of course he will be willing to pay the tax."

The beginning of the importance of the east-bound grain traffic appears in this connection, for Mr. Horton and Mr Kellogg (Ill.) opposed the tonnage tax on the ground that it would hinder this traffic.

In addition to the question of passenger revenue versus total revenue, the levying of a rate per passenger rather than a percentage of passenger revenue was debated. As the bill passed the House it provided for a duty of 2 mills per passenger mile, and the 3 per cent. rate was a Senate amendment. The House measure would have meant a rate of about 8 per cent. on the gross passenger earnings and this was well known to that body, so that it evidently favored a higher rate than did the Senate. A strong lobby worked upon the Senate committee, objecting very strenuously to the 2 mill tax as being too high and impossible of assessment. "From the mode in which railroads are connected together, and from their way fares and everything of

[5] Pennsylvania had had such a tax, having abandoned it only a few years previous to this time, on the ground that competition made the tax fall upon the local freight.

that description, it would be absolutely impossible to render an account,'' was Senator Fessenden's somewhat hazy statement of the case, and he told a story related by one gentleman who appeared before the committee to show how the railways guessed at the statistics upon which a similar state tax was based.

When a proposition to adopt the 3 per cent. tax was up in the House, an amendment for a rate graduated according to the earnings and another for exempting bankrupt roads, were rejected.

The debate makes it clear that most of the speakers did not regard this tax as lying upon railway property. In the House Mr. Horton, of the committee of ways and means, said, ''The bill merely makes the railway officers the agents of the government in the collection of this tax,'' and Mr. Olin objected to the proposed 2 mill tax on the ground that it would be a tax on the railways and not on the travelling public. Senator Sherman said, ''They will add 3 per cent. to the cost of a ticket . . . There is no practical difficulty in the way. They will not have to pay it.'' The prevailing idea probably was that the railways could and would as a general thing shift the tax; but that no great harm would be done if they paid it themselves.

The provision concerning bonds and stocks was passed by the House and accepted by the Senate. It was expressly recognized as a species of income tax, differing from the income tax proper in that it stopped the income at the source and fell upon foreign security holders as well as citizens of the United States. It was suggested in the House that this latter fact might lead to repudiation. A proposal to exempt roads not paying interest on their bonds was rejected.

The distinction evidently made by some between the railway company and its stock and bond holders is noticeable, Mr. White (Ind.) stating that this was not a tax on railways but on the holders of railway stocks and bonds. This shows not only a superficial analysis of the relation of a corporation to its members, but also a lack of recognition of the effect of such a tax on the price of railway securities and so upon the financing of railways. And, similarly, there seems to have been no clear perception of the possibility of a raise in railway rates

occasioned by the gross earnings tax being borne at least partly by the railways because of a falling off in traffic.

The proviso authorizing a rise in rates, state laws notwithstanding, suggests the question of states' rights. Some urged that this was a usurpation of power, that the railway corporations were created by the states and were exclusively within their control. Mr. Olin said, "I do not think it by any means clear that when a state legislature says that the creature of its own creation shall not charge more than a certain rate per mile as fare, Congress can authorize it to charge a higher rate,"—and it seems that in so far as intrastate traffic was concerned the objection was legally sound. In rebuttal the question of interstate versus intrastate commerce was practically avoided and the power to tax was appealed to: the government of the United States had the right to tax its citizens, and it had the right to prescribe the manner of taxation and appoint agents to collect it. There can be little doubt that a provision which so clearly interfered with a state's control of the operations of its own corporations within its own boundaries would have been passed at no other time than this period of national crisis.

The Revenue Bill of 1864

The immediate returns from the gross passenger revenue tax were small, amounting in 1863 to but $1,106,000, in round numbers, and there was an increasing necessity for national revenue. The revenue act of 1864[6] (s. 103) made every owner or manager of a railway, including both steam and street railways, or other agency of transportation for hire, subject to a duty upon total gross receipts, including both freight and passenger earnings. The rate was reduced to 2½ per cent. The rate of taxation on interest and dividend payments was raised from 3 to 5 per cent. and was made to apply also to "all profits . . . carried to the account of any fund, or used for construction." The net result was to greatly increase returns from the tax, the amount received in 1865 being over twice that in the preceding year.

[6] *Statutes at Large*, 38 Cong., 1 Sess., c. 173, ss. 103, 122.

In the debate over this bill the great necessity for additional revenue was dwelt upon, it being stated that there was an actual necessity for tripling the then existing income from internal revenue,[7] and it was predicted that the taxation of gross receipts from freight and passenger service would double returns. When the fact that the northern railways had profited greatly by the war is coupled with this condition, the chief animus of the measure is clear. The ability and intention of the railways to shift the tax appears to have been rightly judged at the preceding session, for it was argued that the tax had almost invariably been paid by the passengers and not by the railroad companies. Indeed, it was charged that the railways had taken advantage of the situation by raising rates more than in proportion to the 3 per cent. authorized in 1862. The tax was extolled as one which equalized the burden over the whole community.

Operation and Repeal of Railway War Taxes

The taxes just discussed were very effective as sources of revenue. The receipts were as follows:[8]

Year.	Gross receipts.	Dividends.	Interest.
1863	$1,106,817	$338,533	$253,999
1864	2,127,249	927,393	596,859
1865	5,917,293	2,470,817	847,684
1866	7,614,448	2,205,804	1,255,916
1867	4,128,255	3,379,262[9]	 [10]
1868	3,134,337	2,630,174	1,259,155
1869	3,255,487	2,831,140	1,503,846
1870	3,732,209	2,898,802	1,869,369
1871	1,637,911	1,121,439	974,345
Total	$32,654,008	$21,416,738[10]	$9,987,844[10]

The marked decrease in the returns from the tax on gross receipts in the years following 1866 was due to an act of July 13, 1866, which limited the tax after August 1 of that year to receipts from passenger and mail service, thus relieving the

[7] *Cong. Globe*, 1863-64, p. 1851.

[8] Adapted from Howe, F. C., *Taxation in the United States under the Internal Revenue System*, p. 106.

[9] Receipts from dividends and interest combined.

[10] Totals not exact—include some collections for '72 and '73.

railways from the tax on gross receipts on freight. With this modification the taxes on railways remained without change till 1870. By an act of July 14, of the latter year, entitled, "An act to reduce internal taxes, and for other purposes,"[11] they were finally repealed.

Like most taxes these duties on railways did not work with perfect smoothness and record of some mistakes is found. For instance, in 1878 a House committee reported in favor of the repayment of $36,000 to the Cumberland Valley Railroad Company on the ground that, because of the issuance of misleading blanks, the company had been led to pay taxes on freight receipts after the act of 1866.[12] Again, in 1882, the House committee on ways and means recommended for passage a bill to relieve the Western Union Railroad Company. In this case the railway had made no net earnings subject to taxation, yet was erroneously assessed.[13] There is also evidence of difficulty in collecting the tax in the case of certain script dividends.[14]

Railways Regulated in Connection with the Tariff: 1870

The act of July 14, 1870, affected railways on a score other than any given above; it brought certain railways into connection with the tariff. Section twenty-nine provided that various goods, if entered at certain ports and bound for certain other ports, might, if properly entered and bonds given, be delivered for immediate transportation: that is, they were to be examined but not carried to the appraiser's office nor the duty to be paid at the port of entry. Such goods were to be delivered only to common carriers designated by the secretary of the treasury, which were to give bonds and be liable to the United States as common carriers for the safe delivery of the goods. Transportation was to be in sealed cars (or vessels) under exclusive control of customs officers, and these cars could not be unloaded between points of entry and destination. This last provision, however, was later modified.

[11] *Statutes at Large*, **16**: 260-1, 270-1.
[12] *H. Rep.*, 1877-78, no. 693.
[13] *Ibid.*, 1881-82, no. 439.
[14] See *Cong. Globe*, 1870-71, p. 92.

Such a measure sounds burdensome in its restrictions, and the secretary of the treasury in his report for 1870–71 said, "In the nature of the case, the regulations are stringent."[15] But he believed that when the railways had given bond and the importing merchants of the interior cities had made arrangements on the basis of the act no serious difficulty would arise.

Bill to Punish the Collection of Illegal State Taxes: 1869

The attention of Congress was next called to the taxation of railways by an attempt to do away with the taxes levied by certain states upon traffic over their borders, that is, upon interstate traffic. Shortly before the repeal of the federal tax on railway earnings, a bill was introduced in the Senate, the title of which was "A bill to punish the collection of illegal taxes on passengers."[16] It provided that it should be unlawful for any railway incorporated by a state to pay to that state a tax upon passenger transportation into or out of the state or across its territory, the penalty to be a fine of from $1,000 to $5,000; and any agent of the state was made liable to a fine of $2,000 for collecting such a tax.

The occasion for this bill was as follows: By a law passed in 1832 by the state of Maryland a tax of 20 per cent. was laid upon the receipts of the Baltimore and Ohio from passenger traffic between Baltimore and Washington, and, to insure returns, it was further enacted that the rate should not be less than $2.50 unless authorized by the state legislature, and in no case should it be less than 25 cents.[17] And in 1844 an amendatory act in reducing the fare to $1.50 provided that 20 per cent. of the passenger earnings should be paid into the state treasury. But Maryland was not the sole nor the earliest offender in this practice; as early as 1830 New Jersey passed an act prescribing a tax of 10 cents per passenger and 15 cents per ton of freight passing over the Camden and Amboy.[18] The railways bore the

[15] p. viii.
[16] *Cong. Globe*, 1868–69, p. 490.
[17] *Ibid.*, Append., p. 60.
[18] *Ibid.*, and see *Bul. of U. of W., Econ. and Pol. Sci. Series*, 3: 245; reprint, vol. I, p. 79.

taxes patiently for they were not only in lieu of other forms of taxation but conveyed valuable privileges, rising to a legal monopoly in the case of the New Jersey road.

In advocating the bill Mr. Morton (Ind.) argued that these taxes were not taxes upon railways but taxes upon passengers or travel, because in the nature of things they were added to the price of passage. Moreover it had long ago been decided, in McCulloch vs. Maryland,—it is interesting to note the same state was involved—that the right to tax is the right to destroy; thus if the state had the right to levy a tax on passengers it had a right to prevent travel by making the tax so high as to be prohibitory.

Mr. Frelinghuysen (N. J.) took up the defense of the state of New Jersey.[19] He denied that the tax was one on passengers. It was a tax on business—on the company in respect to its passengers—and was in accordance with its ability to pay. To be sure the consumer paid the tax ultimately as would be the case no matter what form of tax was adopted.[20] He took effective ground in calling attention to the fact that Congress had put in force a tax exactly similar to that of Maryland. "This action of Congress," he said, "will at least make the crime New Jersey is guilty of respectable."

No further discussion of this matter is found,—except that at the next session a joint resolution of similar tenor to the bill was introduced,[21] and in 1870 the Senate allowed another bill to pass over[22]—and it was not for several years that these state restrictions were removed. Both the federal tax and the state taxes were of doubtful constitutionality, the one to the extent that it amounted to a regulation of intrastate commerce, the other in that it restricted interstate commerce.

[19] *Ibid.*, p. 521.

[20] A lack of knowledge of the laws of monopoly price is again evinced. When a tax on a monopoly is proportioned to the volume of traffic, as was the N. J. tax, the largest net revenue would be obtained by raising rates and reducing traffic, and so the tax would be partly, at least, borne by the public. But if the tax were not so proportioned this would not be true.

[21] *Ibid.*, 1869-70, p. 323.

[22] *Ibid.*, 1870-71, p. 58.

Wage Certificates Taxed as Notes

In 1882 the Philadelphia and Reading was in poor financial condition, which condition had been forerun by an issue of wage certificates made somewhat previously. These wage certificates were simply the promissory notes of the company issued in small denominations to its employees in lieu of cash. Under the act of 1875, which laid a tax on the issue of notes for circulation, these wage certificates were taxed, and the railway company asked to be relieved. A bill was introduced to relieve the creditors of the road—it being in bankruptcy—from paying the tax.[23] The committee on ways and means which reported on the question[24] thought that it was not the purpose of Congress to prevent corporations or individuals from issuing promissory notes and that the wage certificates were not currency, but did not commit itself further. The company seems to have been taxed, for the bill was laid on the table and no further record of the matter is found.

Taxation of Land Grants

In treating of the relation of Congress to railway taxation the subject of land grants should be given mention. It was held by the supreme court that technically the title to lands granted by Congress did not vest in the railroad companies until formally certified and patented, and that the states could not tax these lands so long as they were public lands and did not belong to the railways.[25] Accordingly railway companies found it to their advantage to delay patenting as long as possible and thus avoid taxation. Millions of acres were held by them, and even made the basis for bond issues, without paying a dollar of taxes.[26] It is little wonder that many bills were introduced with the purpose of declaring such lands subject to state and

[23] *Cong. Rec.*, 1881-82, pp. 884-890.
[24] *H. Rep.*, 1881-82, no. 25.
[25] 16 *Wall.* 607, R. R. vs. Prescott.
[26] For accounts of the situation see *H. Rep.*, 1873-74, no. 474; 1878-79, no. 709; *Sen. Docs.*, 1875-76, no. 20; *Cong. Rec.*, 1885-86, p. 1428. And see above, p. 25 f.

local taxation. Needless to say the Pacific railways were the great offenders in this matter.

The evil appears to have reached a climax about 1886, the Northern Pacific being a chief offender.[27] It was stated that this road held 50,000 square miles subject to a provision that no patents should issue until all fees arising from selection and survey had been paid. But until patents were issued the land was untaxable. The railway profited by the situation in a two-fold way: it exempted itself from taxation by not paying the fees; and demanded a high price for the land, as being tax-free! The Northern Pacific was not the only offender. A law was finally enacted to provide for the taxation of railroad land grants; such lands were not to be exempt from state or local taxation because of any lien of the United States for selecting, surveying, etc.[28]

Summary

As the present chapter has been chiefly occupied with a war tax it might have been included in the preceding chapter, but inasmuch as the subject of taxation has such economic distinctness it has seemed well to devote separate attention to it. Moreover, the internal revenue taxes of the Sixties are not the only taxation matters in which the government has been related to the railways.

The conclusion to be reached, as to the record of facts and events, is that in no case has a federal tax been avowedly levied upon railways. The tax upon gross receipts was laid with the idea that it would be shifted; and, though we know this could not well have occurred in the case of railways having a monopoly, it was stated to have been generally done. *Making due allowance for the operation of patriotism and for the increased demand for transportation* on many lines, the deduction might be made that many railways were not receiving the highest net returns prior to the war. Water competition was of considerable importance, and most railways were in poor financial condition at that time.

[27] See *Cong. Rec.*, Feb. 15, 1886, p. 1428 ff.
[28] *Statutes at Large*, **24**: 143.

It is obvious that the tax on interest and dividends was a part of the income tax system and it seems proper to regard the whole tax simply as a means of raising revenue from the people. Congress certainly did not comprehend the complicated action and reaction of the tax, nor the extent to which it would lie with the railways.

In addition, railways were subjected to stringent restrictions in certain cases where they were designated as routes for carrying dutiable imports, and their notes in the form of wage certificates were taxed. There was a strong movement against the taxes imposed by certain states, and an effort was made to subject unpatented land grants to state and local taxation.

The growth of nationalism during the war has been commented on, and it is in connection with this fact that the attack on illegal state taxes should be considered. Coming just about 1870 on the eve of the beginning of active state and national railway regulation, it indicates the growing restiveness of the nation under the abuses of the old railway regime. And the passage of a tax so clearly bearing on intrastate traffic is further evidence of the same tendency.

CHAPTER XV.

CONGRESS AND THE RAILWAY IN THE TERRITORIES AND THE DISTRICT OF COLUMBIA.

In the *Congressional History of Railways in the United States to 1850,* six different bases of government regulation, corresponding to as many points of contact between government and transportation development, were distinguished; and first among these were mentioned the closely allied points, government control in the Territories and in the District of Columbia.

Regulation in the Territories.

As early as 1838 evidence was found of a tendency on the part of Congress to provide for government regulation of railways in a territory of the United States.[1] From 1850 on, for a period of some twenty years little regulation based on this power was exerted: that was a time when the *laisser faire* idea was dominant. President Pierce in his message of December 5, 1853, voiced the ruling opinion when he wrote: "although the power to construct, or aid in the construction of, a road within the limits of a territory is not embarrassed by the question of jurisdiction which would arise within the limits of a state, it is nevertheless held to be of doubtful power, and more than doubtful propriety, even within the limits of a territory, for the general government to undertake to administer the affairs of a railroad, a canal, or other similar construction."[2]

This was undoubtedly the prevailing attitude toward the interference of Congress with railways, even in territories, during

[1] Above, *Bul. of U. of W., Econ. and Pol. Sci. Series,* 3: 263; reprint, vol. I, p. 97.

[2] *Cong. Globe,* 1853-54, p. 144.

the earlier years of the second half of the century: it was on a stronger basis than interference within a state; but its constitutionality was doubted, while its inexpediency was certain.

Episode With Land-Grant Railways

During the years just referred to the congressional history of railways in the territories consists mainly of land-grant affairs. One illustrative episode follows. In 1854, Congress granted land to Minnesota for railways with the proviso that none should enure to companies then constituted *or* organized.[3] It was charged that during the course of the bill the words were fraudulently altered by substituting "*and*" for "or" in the proviso and that a "company of Wall Street land catchers" under the name of the Minnesota and Northwestern Railroad Company had profited by the change in that, technically, they had been only "constituted" at the time of the grant, not organized. Accordingly it was resolved that, whereas the law organizing the territory of Minnesota provided that all her legislation should be submitted to Congress for approval and if disapproved be void, the act incorporating the Minnesota and Northwestern—and the Transit Company—be declared null and void.[4]

Down to the time of this action seven railway companies had been incorporated by Minnesota, so that five companies remained intact. Mr. Rice (Minn.) then offered a resolution that the charters of these other companies be annulled on the ground that otherwise discrimination would result.[5] He desired to save the land grant,—believing the territory able to act wisely in its own interests and regretting Congressional interference in local affairs,—and wished a fresh start. The entire grant was finally repealed.[6]

[3] *Statutes at Large*, x: 302, s. 3.
[4] *Cong. Globe*, 1854-55, p. 450, 451.
[5] *Ibid.*, p. 481. This resolution does not appear to have been carried.
[6] *Ibid.*, pp. 2172, 2178.

Congress Forbids Territories to Incorporate Railway Companies: 1867

The first important action taken by Congress concerning railways in the territories came in 1867, when they were forbidden to incorporate railway companies. The act was amendatory to an act to provide a temporary government for Montana passed in 1864. Section one enacted that, after its passage, the legislative assemblies of the several territories of the United States should not grant private charters or special privileges; but they might, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and "other industrial pursuits."[7]

Railway transportation clearly might have been included as an industrial pursuit, but it was not so construed and for five years after 1867 Congressmen were accustomed to preface arguments for bills incorporating railways in the territories by remarking that these political units could not incorporate railways.

Territories Authorized to Incorporate Railways by General Laws: 1872

The right to incorporate railways being denied the territories and concentrated in Congress, the evils and difficulties of special legislation soon became apparent. In 1872 a bill was up in the Senate which proposed to annul a general law passed by the territory of Dakota authorizing subscriptions by counties and townships to railway companies, but excepting from its ban anything done towards authorizing and constructing the Dakota Southern railroad, running from Sioux City, Ia., to Yankton.[8]

The committee on territories, which reported the bill, approved the particular railway concerned, but favored the nullification of the territory's general law. The fear had arisen that the territory had gone beyond its power in passing the general law and allowing subscriptions and bond issues, so that it had

[7] *Statutes at Large*, **14**: 426.

[8] *Cong. Globe*, 1871-72, p. 2836. The bill went over and was not passed.

become difficult to realize upon these credits, and the work was delayed.

This was the situation in many other cases. Congress had passed an ambiguously worded act on the subject, and, though it was generally held to prohibit territorial acts of incorporation, such acts were passed and confusion resulted. Moreover Congress was flooded with bills for incorporating railways in the territories. It was stated in the Senate that there were fifteen or twenty special bills of incorporation pending, and one hundred and eighty were introduced in the House during the session, according to the statement of Mr. Stewart. It is little wonder that squabbling was complained of, and that a lobby of from fifty to one hundred men pressed those numerous schemes.[9]

In this same year, 1872, bills were introduced in both houses for a general law of incorporation for railways in the territories,[10] and it was such a condition that led to the passage of an act amendatory to the act of March 2, 1867, at this session. It provided that section one of the earlier act, so far as it related to incorporations created for the purpose of mining, construction and operation of railroads, and for all rightful and constitutional subjects of legislation under the general incorporation laws of any territory, should be construed as authorizing the legislative assemblies of territories by general incorporation acts to permit persons to associate together for these purposes.[11]

Federal Regulation and Incorporation of Railways in Territories Proposed: 1875

The passage of this act expressly authorizing the territories to incorporate railway companies by general law did not bring entire satisfaction. There were complaints of cases in which counties had gone bankrupt through territorial legislation. Mr. Jones (Wyo.) made the statement in 1873 that the laws of the territories were such that no one would risk incorporating un-

[9] *Ibid.*, p. 4161.
[10] *Cong. Globe*, 1871-72, p. 1351 (Sen.); *Ibid.*, p. 4161 (House).
[11] *Statutes at Large*, **17**: 390.

der them.[12] Some Congressmen, too, did not know of the existence of the act of 1872 authorizing territorial incorporation.[13] There continued to be numerous bills brought up in Congress for federal incorporation, it being stated in January, 1875, that there were some twelve bills of this nature before the Senate.

Of these the following may be taken as an illustration. In 1873 the House debated and passed a bill to incorporate and grant a right of way to the Wyoming and Montana Railroad Company.[14] It was objected that the United States would be embarrassed in managing a corporation in Wyoming when that territory should become a state, that the corporation would master the state, and that Congress was growing too lax in incorporating railways.

Mr. Hoar (Mass.) charged Congress with gross remissness in its duty. "The ordinary safeguards which every state puts into its acts of incorporation . . . have been wholly omitted, or nearly so, in many of the acts of incorporation passed here. They are brought before us crude, hastily drawn, incomplete, and passed with little debate." The bill under discussion did not require any one in the enterprise to pay a dollar of his own money; it did not provide for payment of stock in cash; it placed no restriction on the franchise.

As passed by the House the bill contained provisions that it should be subject to repeal by Congress and the future states of Wyoming and Montana. This was good, but the provision concerning capitalization was very bad. The capital stock of the company was to consist of 100,000 shares of a par value of $100 each, and, as soon as only 5,000 shares were in good faith subscribed for and $10 a share actually paid in, the stockholders might meet and transact business.

There was also the common provision that when the road ran through a cañon or mountain pass it was not to prevent other roads from using the same.

In 1874, Senate bill number 378 was introduced,[15] and finally,

[12] *Cong. Globe*, 1872-73, p. 1154.
[13] *Cong. Rec.*, 1874-75, pp. 1156-1159.
[14] *Ibid.*, pp. 1154, 1258. No action upon it by the Senate is found.
[15] *Ibid.*, 1873-74, pp. 911, 2896, 3042.

after much debate, an amendment was passed in 1875.[16] At the outset the bill proposed a general provision for the incorporation and regulation of railway companies in the territories of the United States, and granting right of way. It was calculated to save Congress a large amount of special and local legislation. During the course of the bill in the House Mr. Holman (Ind.) introduced an amendment giving future states the right to fix rates and prevent discrimination. It was objected that Congress could not delegate the power to regulate commerce, to which objection a reply was made that came naturally to men who had so recently experienced the Civil War: there would be no delegation of legislative function, but, simply, Congress would lay down conditions for railways. Mr. Garfield regarded the situation as quite analogous to the imposition of conditions upon the southern states when they returned to the Union.

It was even argued against the amendment that it was objectionable in that it seemed to confer these powers upon the states, whereas the states have a perfect right to control their own affairs. Congress could neither confer it nor remove it. Such reasoning shows considerable delicacy on the subject of a state's rights in control of its commerce.[17]

After considerable discussion, then, Mr. Holman's amendment was rejected by a vote of 84 to 66.

An amendment proposed by Mr. Hoar was adopted. It was to the effect that all rights of way granted under the bill should be subject to the authority of any state thereafter formed and through which the railway should pass, as if the land occupied by it had been originally granted by the state.

[16] *Ibid.*, 1874–75, p. 404.

[17] This objection came from a representative from Illinois, which state was in the throes of the Granger movement. It was not till 1886 that it was decided that the several states did not have control over all commerce originating within their borders even when shipped beyond them. In this connection the words of D. C. Cloud in "Monopolies and the People," published at Davenport, 1873, are interesting. He wrote: "The power to grant charters cannot vest in the states, and territorial governments, and at the same time exist in the general government, for the reason that the supreme power must exist in one or the other. The assumption by Congress to create private corporations is a fatal stab at our system of government, destructive of State rights, and a wanton violation of the constitution." (p. 93.) This, however, was not the generally prevailing attitude. See below, chap. xix.

The House also empowered the territorial legislature to regulate the manner in which the new railways should exercise the right of eminent domain.

The Senate did not concur in these amendments and a conference was necessary. When the bill finally emerged the clauses giving states the right to fix rates and general authority over the roads had been stricken out, and, though Mr. Holman and Mr. Wilson (Ia.) declared this an attempt to perpetrate a fraud upon the House and upon the nation and great excitement prevailed, the report of the committee of conference was accepted. As finally passed this measure was entitled "An act granting to railroads the right of way through the public lands of the United States," providing general right of way legislation, but practically shorn of regulatory intent.[18]

Indian Territory; Congress Regulates Rates

When railway development began in the southwest Congress was called upon to regulate its advances upon Indian lands. Indian Territory constituted a barrier, and as late as 1883 but one road crossed it from north to south. By treaties made in 1866 the several tribes provided for right of way to railway companies to be incorporated thereafter; but dispute arose as to how many lines were meant, as to whether the United States had the right of eminent domain, and there was much complaint that the Indians were abused.[19] The view that the government had the right of eminent domain finally prevailed; but it became customary to insert in land-grant acts provisions requiring the consent of the Indians with the approval of the president.

In 1886 an act was passed which authorized a railway company to construct and operate through Indian Territory.[20] A hundred-foot right of way, with land for stations, etc., was granted, but the most interesting feature of the act was that concerning rates. The company was prohibited from charging

[18] *Statutes at Large*, **18**: 482.

[19] See *Rep. of Comm.*, 1872-73, Ser. no. 1578, p. 296, for full treatment. Also *Cong. Rec.*, 1880-81, pp. 1418, 1902, 2377, 2407; *H. Rep.*, 1883-84 no. 211; *H. Rep.*, 1881-82, no. 934.

[20] *Statutes at Large*, **24**: 124. Kas. City, Ft. Scott, and Gulf R. R. Co.

higher rates than were authorized by the state of Arkansas, provided passenger rates did not exceed three cents per mile. Furthermore, Congress reserved the right to regulate freight and passenger rates until a state government should be formed, when this right was to pass to it.[21]

Progress toward an interstate commerce law is indicated by the express reservation of the right of Congress "to fix and regulate at all times the cost of such transportation by said railroad or said company whenever such transportation shall extend from one state into another."

Bills to Prevent Loaning of Public Credit to Railways in Territories

Mention has been made above of cases in which local units within the territories lent their credit to railway companies, and some complaint of loss resulted. Indeed, the great loss[22] of counties and towns through subscriptions to railway securities is notorious. Though no legislation to remedy this evil was carried through, it should be observed that several bills for that purpose were introduced at various sessions. In 1873 a bill to prohibit territories from loaning their credit to railway companies was brought up in the Senate;[23] in 1874 there were bills to prohibit territorial legislatures from authorizing towns, cities and counties to incur indebtedness to railway companies; in 1878 the House referred a bill to forbid territories, and cities, counties, and towns therein to incur indebtedness in aid of railway companies or other private corporations to its committee on territories.[24]

That there was abundant need for some such measure and that it was clearly recognized by many congressmen, appear in a debate which occurred in 1875. The Senate was considering a bill to grant a right of way to the Seattle and Walla-Walla Railroad and Transportation Company,[25] which the committee on

[21] The words were: "to fix and regulate the cost of transportation."
[22] Immediately, at least.
[23] *Cong. Globe*, 1872-73, p. 1308.
[24] *H. Jr.*, 1877-78, p. 185.
[25] *S. Jr.*, 1874-75, pp. 1156-59; *Cong. Rec.*, 1874-75, pp. 1156-59.

territories proposed to amend by authorizing the officials of certain towns and counties to issue bonds to aid the company. It was urged against the proposal that railways had been pushed beyond the requirements of the country and needed no stimulus; private capital would build when needed.

It was very pernicious to allow communities to mortgage their property in advance of population. Whenever tried, it had been regretted later. Throughout the majority of the western states the system had been tried for the past fifteen or twenty years, and nine-tenths of the incorporations which had incurred indebtedness were either in default of payment on the interest or were attempting to repudiate both interest and principal. And a senator from Pennsylvania recited that state's gloomy experience. Against such arguments as these the pleas that the voters of the territory had the right to tax themselves as they pleased, and that there was dire need for transportation developments, were vain and the bill came to nothing.

But only in this negative way was action taken.

Regulation in the District of Columbia

The authority exercised by Congress over railways in the territories and in the District of Columbia has been similar, and, indeed, between the years 1871 and 1875 a territorial form of government was in force in the District. In the latter, however, there was not even the shadow of autonomy—no legislative assembly nor representative. Congress was and is the direct and sole authority. There has not been the settlement of a vast wilderness aided by gifts of land of proportionate vastness as was the case with the territories; but for a long time the railways entering the district were so few, their service so poor, and the development so slow that conditions were truly territorial. This condition prevailed years after application made by railways for the right to extend into the District of Columbia, stimulated by such a state of affairs, and ruinous monopoly was early charged against the single railway which served it.[26]

[26] See *Bul. of U. of W., Econ. and Pol. Sci. Series*, 3: 258; reprint, vol. I, p. 92.

Authorizing Extensions Into the District of Columbia

Among the earliest bills for the authorization of a railway extension into the District of Columbia was that concerning the Washington and Alexandria railroad which was passed in 1854.[27] This extension was to fill the need for communication with the South which was at that time extremely unsatisfactory. The railway was to run via Georgetown across the Potomac at the head of navigation, to Alexandria, where it would connect with southern systems. The bill easily passed the Senate. The House amended it so as to authorize the Baltimore and Ohio to build a branch through Washington to the river with the idea of running ferries to Alexandria, and, although the Senate nonconcurred on the ground of competition and fear that the ferry line would in some way become a bridge(!), this provision was included.

The bill contained safeguards for the interests of Washington in its streets.

Other instances in which Congress was called upon to authorize the entrance of railways into the District of Columbia might be given, as follows. In 1860 the Alexander and Hampshire Railway, a Virginia corporation, was given the privilege of crossing the Potomac and establishing a depot at Georgetown.[28] The Baltimore and Potomac Railway was, in 1867, empowered to extend a lateral branch into the district.[29] It was with the passage of this act that the Baltimore and Ohio Railroad Company's monopoly in the District of Columbia was broken and the Pennsylvania gained access to Washington. For some time the latter railway company had tried to get into the district, and it had striven in vain to secure a charter from Maryland for that purpose. It was finally discovered that an old charter lay dormant in the hands of the people of the southern counties of Maryland, and the Pennsylvania interests bought it.[30] This charter conveyed the right to build branch lines and accordingly the com-

[27] *Cong. Globe*, 1853-54, pp. 1997, 2184.
[28] *Cong. Globe*, 1859-60, pp. 414, 1467.
[29] *Statutes at Large*, **14**: p. 387.
[30] *Cong. Globe*, 1871-72, p. 3479, seq.

pany at once besought Congress for entrance to the District of Columbia and Washington. Concerning this Maryland corporation more will be said in this chapter in another connection.

But not all applicants were successful. Thus the bill to authorize the Southern Maryland Railroad Company to enter the District of Columbia for the purpose of forming a connection with the Baltimore and Potomac failed at the 1876–77 session of Congress.[31] This measure was brought up at following sessions in vain. An amendment to the bill in 1881 providing that the railway might charge 8 cents per ton per mile for freight was stricken out, and amendments protecting public property from encroachment were adopted;[32] but, though the bill passed the House, it failed to become a law. Finally, in 1882, the Southern Maryland gained the privilege.[33]

Incorporation

Naturally, too, the position of Congress in the District of Columbia led to applications for charters of incorporation by railways. In 1877, for instance, the House passed a bill incorporating the Washington City and Atlantic Coast Railway Company. Though this bill failed to pass the Senate it is of some interest as an index of what might pass the House. The railway was to run from near Uniontown, on the eastern branch of the Potomac, to a point on Chesapeake Bay in Anne Arundel county, Maryland. The capitalization authorized was twenty-five thousand shares of stock of a par value of $50 each, and seven per cent bonds to the amount of $500,000. It is interesting to note that the bill contained a long-and-short-haul clause, the first, it is believed, to be incorporated in a bill and pass one house of Congress.

The bill was amended to read,—"the company shall not charge for transporting persons or merchandise more for a less than for a greater distance, nor discriminate against shippers from the same point on their line to any other on their line or

[31] *Cong. Rec.*, 1876–77, pp. 2212, 2215.
[32] *Ibid.*, 1880–81, p. 1575.
[33] *Ibid.*, 1881–82, pp. 3101, 3244, 5164.

to points on other lines of railroads.''[34] The Senate referred the bill to its committee on the District of Columbia and there the matter ended.

In spite of this and other bills introduced from time to time Congress incorporated no steam railway in the District of Columbia down to 1887.[35] Street railway companies and various other societies and industries were chartered; but *steam* railways were conducted by the creations of neighboring states.

Just at the close of our period, however, in January, 1889, Congress passed an act incorporating the Washington and Western Maryland Railroad Company. This being after the passage of the law regulating inter-state commerce, its provisions are in some respects more comprehensive than those of earlier regulatory measures. The corporation was to have the right to collect as toll and transportation charges 6 cents per ton per mile for freight and 3 cents per mile for passengers; but, regardless of distance, a minima of 10 cents per passenger and 25 cents for any shipment of freight were authorized. No bonds could be issued until half the stock had been paid up and stockholders were made individually liable for the full amount of stock subscribed until their subscriptions were paid in full.[36]

Extension in Washington City: Senate Votes a Regulation of Inter-State Commerce

Another aspect of Congressional railway control in the District of Columbia grew out of the necessity for protecting the streets and parks of Washington from the avidity of railway companies. Especially interesting and important is the debate over a bill to authorize the Baltimore and Ohio to extend the Washington branch of its road to the Potomac river, and across that river by way of the Long Bridge, for the purpose of connecting with the Virginia railroad.[37] In addition to carefully

[34] *Cong. Rec.*, 1876–77, p. 1087.

[35] In 1867 the Washington County Horse R. R. was incorporated, and in 1870, the Columbia Railroad Co. of District of Columbia.

[36] *Cong. Rec.*, 1888–89, debated p. 2322. The railway ran from Georgetown westward between the Chesapeake and Ohio Canal and the Potomac, crossing the District line near the Chain Bridge.

[37] S. no. 377; *Cong. Globe*, 1860–61, pp. 97, 172.

specifying the route for the proposed branch, the bill provided for a maximum freight rate of 25 cents per ton and a passenger fare of the same amount. The distance was about four miles. There was much discussion concerning a section on taxation; but the most interesting part hangs around an amendment proposing that all provisions of the act should be inoperative unless the road pro-rated passenger fares and checked baggage through with all railways terminating at Washington, Alexandria, or Baltimore.

Mr. Kennedy (Md.), who represented the railway's interests, was on his feet at once with the words: "I hope that amendment will not be adopted. I do not really see what the great Senate of the United States has got to do with checking baggage on roads in other states."

Mr. Kennedy was backed by the senators from the South and those of like mind. Mr. Douglass (Ill.) opposed the amendment as being too far-reaching. Mr. Green (Mo.) was against it: "It is true, we have a right to impose terms and conditions within this district; but to impose terms and conditions on a business a thousand miles off, or anywhere beyond the jurisdiction of the Federal Government (!), is certainly wrong." Mr. Yulee (Fla.) expressed the idea of many others when he said, "I think all these matters may properly be left to arrangement among the companies themselves. We ought not to interfere with them." On the other hand, Mr. Cameron (Pa.)—who, it will be noted, had the interests of rival Pennsylvania lines at heart—led the defence. He explained that the Baltimore and Ohio refused to check baggage through when the trip was partly over a competing line, and that congressmen traveling west via Baltimore, for instance, had to re-check their baggage at that point if they took the Pennsylvania Central or Pittsburgh and Fort Wayne. This meant vexatious delay and was discriminatory. As Mr. Doolittle (Wis.) said, ". . . It is not for the simple question of checking baggage that we want to put a little restriction upon this great mammoth corporation that is taxing every passenger that goes over it a much higher rate than is charged upon railroads generally."

Between these extremes was a group which agreed that the

proposed amendment was of rather an extraordinary character, but thought the nature of the case required it. In other words, their strict constructionist scruples were overcome by the desirability of doing away with the checking evil or by hostility to the Baltimore and Ohio's monopoly.

With the pro-rating clause omitted, the amendment was agreed to and the bill containing a regulation of inter-state commerce, passed the Senate by a vote of 30 to 15. The House however, referred the bill to the committee on the District of Columbia and took no further action.

How sharply party lines were drawn in the debates of these late ante-bellum days is well indicated in the course of this bill. A proviso that Congress might *repeal* the charter which it was proposed to give was closely contested, and, by a strictly party vote of 21 to 20, the Senate decided that Congress could only provide for the limitation or alteration, not the repeal, of a charter.[38] A senator remarked that this vote furnished a most instructive lesson in political history: the whole Democratic party, which had formerly stood for limiting corporations, voting solidly to put control of the corporation beyond the power of Congress.

Authorizing Passenger Depots in Washington

The Baltimore and Potomac Company, having gained access to Washington, next required depot rights, and was not slow in asking for them. Accordingly, in 1871, we find Congress passing an act, supplementary to the act of 1867 authorizing the Baltimore and Ohio's extension, which allowed the railway to erect a passenger depot over its tracks on Virginia Avenue between Sixth and Seventh streets.

The location, however, proved to be not sufficiently central, and at the next session came the fight for the location nearer Pennsylvania Avenue later occupied by the Pennsylvania railway. The company first got the approval of the board of aldermen and common council of the city of Washington. Then House bill No. 2187 was introduced and passed, by a vote of 115

[38] *Ibid.*, p. 178.

to 55, without effective opposition.[39] In the Senate the opposition headed by Senator Morrill (Vt.) and Senator Hamilton (Md.) was more obstinate. An effort was made to have the bill referred to the committee of public buildings instead of that on the District of Columbia, the former being hostile to the measure.[40] The power of the city to grant certain lands was denied; that the site desired would seriously mar the public park was urged; and an effort was made to discredit the motives of the senators who supported the bill, open implications of bribery and abuse of passes being brought forward. An attempt was made to turn the unpopularity of land grants and large railway systems in general against the company, painting it as a monster monopoly continually encroaching on public property.

But all in vain. The Baltimore and Ohio had enjoyed its monopoly too long and railway facilities were inadequate. The Pennsylvania people talked of greatly reduced freight rates; of a great highway from New York to New Orleans and the Pacific coast, upon which Washington should be an important point; and mentioned the money and labor already expended to that end. The bill passed 39 to 18,[41] and the triumph of the Pennsylvania was complete.

Later, the citizens of Washington petitioned for the removal of the Baltimore and Potomac's tracks, but for a generation the company remained camped across the line of parks and gardens that extends from the president's park to the Capitol grounds.

Authorizing Subscriptions to Railways

Just as, in the territories, Congress was called upon to regulate aid given by local units for railway purposes, so, the District of Columbia and the city of Washington have asked Congress to authorize subscriptions to various transportation enterprises. Simply to illustrate: in 1872 the question of authorizing a subscription of $665,000 made by the people of the district to the Piedmont and Potomac Railroad Company came up, and, in spite of the pessimism of some who believed that no

[39] *Cong. Globe*, 1871–72, pp. 1901, 2075, 2076.
[40] *Ibid.*, p. 2279.
[41] *Ibid.*, p. 3438.

city or county had ever subscribed to a railway's stock without being a loser by it, the bill was passed.[42] It authorized a subscription of $600,000; but imposed several conditions: $1,000,000 must first be paid in by private parties and be expended in construction, the company was to give bonds for $800,000 to insure completion in three years, and no bonds issued by the district to raise the amount of its subscription could be sold below par. Later an unsuccessful attempt was made to repeal this act of authorization.[43]

In the case of the Washington and Ohio Railroad Company, Congress withstood repeated efforts to obtain its authorization for a subscription by the city of Washington[44] and the federal government.

Summary

There remains but to mention the fact that Congress has authorized and minutely regulated the various street railways of the district,—beginning in the early Sixties,—and the main outline of railway affairs within the District of Columbia is sufficiently clear. Congress has authorized extensions of railways into the district; and within Washington city; has incorporated railways; has authorized subscriptions to their stocks. In doing these things construction has been regulated and streets and parks and bridges safeguarded; fares, rates, and checking baggage have been controlled; and the lengthy discussions over railway affairs in the District of Columbia must have formed no small part of the railway atmosphere of Congress. It was in debate over such bills that, in 1872, a senator impatiently exclaimed, "It seems impossible to get attention to anything but railroad bills."[45]

Similarly, in the territories Congress has incorporated railways and regulated incorporation by the territories themselves. Rates have been regulated;—and, in general, Congress' relation to territories has been fruitful of railway debate.

[42] *Cong. Globe*, 1871-72, Sen. bill no. 691. *Statutes at Large*. **17**: 158.
[43] *H. Jr.*, 1874-75, p. 260. See index to bills, H. bill, no. 4290.
[44] See *Cong. Globe*, 1870-71, pp. 593, 1885; S. Jr., 1874-75, p. 88.
[45] *Ibid.*, 1871-72, June 6,—Anacostia and Potomac River R. R. Co.

CHAPTER XVI

THE MAIL SERVICE AND RAILWAY REGULATION

It is the aim of the following chapter to sketch the ways in which the desire of our government for the safe and speedy transportation of the mails has figured in the aggregate of motives which has led to railway regulation. The mail service has been an important point of contact between the government and the railway from early times; today the chief instrument of that service is the railway, and about two per cent. of the aggregate gross earnings of the railways of the United States is received for transporting the nation's mail.

Regulation Prior to 1850

All the material concerning the railway service to be gathered from congressional sources mainly falls under two heads: aid and regulation. Down to the Fifties, the attitude of Congress was predominantly one of granting aid, and propositions for regulation were generally coupled with such grants. In 1819 one of the grounds for a petition from one, Benjamin Dearborn, for aid to his contrivance for steam transportation was the belief that it was well calculated for the conveyance of the mails; one of the objects of the Survey Bill of 1824 was the necessity for transporting the public mail; and, in 1825, the House resolved to inquire into the utility of railways "as a mode of conveyance for the mail in carriages." Finally the great land grant of 1850 made stipulations concerning the mail service to be rendered by the recipient.

Between 1840 and 1850 Congress definitely rejected the idea of demanding free mail service.

Very early the exactions of the railways, real or supposed,

necessitated regulation by Congress. Before the railway became a factor in transportation, a system of contracting for the conveyance of the mails had been adopted which was based upon competitive bidding. Reliance was put upon competition to secure reasonable rates, and, during the stage-coach regime, the results seem to have proved fairly satisfactory. Early in the Thirties, however, complaints began to appear that competition was a failure in so far as rates for railway mail transportation were concerned, and that the government was paying exorbitant rates. In 1834, in a report to President Jackson, Postmaster General Barry stated that it was a subject worthy of inquiry whether measures might not then be taken to insure the transportation of the mails upon the rapidly multiplying railways of the country, and he expressed fear lest these corporations might make exorbitant demands "and prove eventually to be dangerous monopolies."[1]

In 1835 the development of the situation in regard to the mail service was such that President Jackson used the following words: "Already does the spirit of monopoly begin to exhibit its natural propensities, in attempts to exact from the public . . . the most extravagant compensation. If these claims be persisted in the question may arise whether a combination of citizens, acting under charters of incorporation from the states, can, by a direct refusal, or the demand of an exorbitant price, exclude the United States from the established channels of communication between the different sections of the country; and whether the United States cannot . . . secure to the Post Office Department the use of those roads, by an act of Congress which shall provide . . . some equitable mode of adjusting the amount of compensation."

In 1838 an act was passed which declared all railways post-routes. This act of 1838 is the first of a series of acts regulating the rate of payment for mail transportation which extends down to our own day. It provided for a payment not to exceed 25 per cent. above what "similar transportation would cost in post coaches." Obviously there would be difficulty in determining what was similar transportation, and within a year another

[1] *Sen. Docs.*, 23 Cong., 2 Sess., no. 1.

act established a maximum of $300 per mile per annum. Further development came in 1845 when railway mail routes were classified according to the importance of the service, etc., into three groups, receiving maximum rates of $300, $100, and $50 per mile per annum, respectively.

In general, it may be said that prior to 1850, the great need of the nation for increased postal facilities, acting and reacting with the demand for transportation facilities in general, made aid the characteristic attitude of Congress; but that as early as 1835 friction arose between the post office department and the railways which led to regulation of rates for the mail service and to rather radical proposals for railway control.

Completed Parts of Railways Made Post-Routes: 1853

Among the first important actions on the subject of the railway mail service of which record is found in congressional documents of the second half of the nineteenth century was an extension of the power of Congress over railways and an emphasis of their public nature. It will be remembered that in 1838 all railways had been declared post-routes. Under this act some difficulty arose from the question as to whether or not the transportation of mails might be refused by railways whose lines were not entirely completed, and in at least one case an injunction seems to have been imminent.[2] To meet this difficulty an amendment was offered to the post-route bill of 1853, to the effect that *parts* of railways when in operation should be post-roads with which the postmaster-general might contract according to existing law. As explained by Mr. Rusk, the object of the amendment was simply to make parts of railways which were finished, post-roads, like the whole.

The amendment was agreed to and the bill passed.[3]

The Illinois Central Mail-Service Controversy

The relations existing between government and railways at the middle of the century are, in so far as the mail service was

[2] *Cong. Globe*, 1852-53, p. 934.
[3] *Statutes at Large*, 32 Cong., 2 Sess., ch. 146, s. 3.

concerned, clearly indicated in a controversy which arose with the officials of the Illinois Central Railroad Co. Section six of the act of 1850, granting land to Illinois for railway purposes, provided that the United States mails should at all times be transported over the railway under the direction of the postmaster-general.

Accordingly, on August 4th, 1854, that company was offered $50 a mile per annum, less one-seventh for Sunday service omitted, to convey the mail six times a week over portions of its line.[4] On the sixteenth of the same month the railway replied. So small a compensation could not be accepted. This need be embarrassing to neither party, however, inasmuch as the land-grant act of 1850,[5] which contained the provisions concerning mail transportation, declared that Congress was to prescribe the rates. If the postmaster-general should not feel justified in paying a rate satisfactory to the railway, the latter would be content to await the decision of Congress. But, in presenting its bill in January, 1855, the company thought better of it and accepted the proposed terms, with the proviso that it was not to be bound by them for future service.

Meanwhile complaint was being made concerning its mail service. In a letter addressed to the president, Hon. Geo. W. Jones stated that the company was refusing to be governed by the post office department, or to conform to the schedules prescribed by that branch of the government for the transportation of the mails; and that the people of Iowa and Minnesota were especially dissatisfied with the arrival and departure of mail at Dubuque, the distributing post office for the Northwest.[6] The president of the railway company flatly denied the charge. Admitting the obligation to transport the mails, he stated that his company had contracted for such transportation and had faithfully performed its duty, and concluded by gratuitously stating his belief that the only effectual remedy for the alleged abuses would be found in the proper courts.

[4] *Exec. Docs.*, 1855-56, **12**: no. 48.

[5] See above, *Bul. of U. of W., Econ. and Pol. Sci. Series*, **3**: 363; reprint, vol. I, p. 197.

[6] *Sen. Docs.*, 1855-56, **10**: no. 39.

In this same year, 1856, the Senate passed a resolution calling for copies of the above correspondence and other information concerning the transportation of mail and munitions of war over the Illinois Central railroad.

Unsatisfactory Conditions in the Mail Service

The affair with the Illinois Central is quite illustrative of the general situation. In 1854 complaint is found that the railways were carrying the mails or not, as they pleased, and the proposal was made to suspend duties on railway iron in return for free mail transportation.[7] Two years later, the Senate committee on post office and post roads reported a bill making it the duty of the postmaster-general to form eight-year contracts with all railways desirous of carrying the mails, the companies to be entitled to import railway iron duty-free during the life of the contract as full compensation.[8]

The annual report of the postmaster-general in 1859, in referring to an effort being made to correct abuses, told of a tendency on the part of many railways to evade their proper obligations.[9] Of 318 railway routes, 137 carried the mails without contract, the result being that they did much as they pleased, "departing and arriving at such hours and moving at such speed as was agreeable to them." Said the postmaster-general, "With every disposition to deal with them most liberally, and with a full recognition of their value as postal agents, . . . still it is manifest that their present attitude—seemingly defiant in its tone, as it is disorganizing in its tendencies—cannot be endured without humiliation to the government and without serious peril to those great interests which it is the mission of the department to uphold and advance." He concluded with a threat that the mails will be withdrawn from roads failing to make contracts with the department before March 31, 1860.[10]

Meanwhile, with the rapid expansion of the nation and the

[7] *Cong. Globe,* 33 Cong., 1 Sess., p. 888.
[8] *Sen. Rep.*, 1856-57, no. 306. Daily service once each way.
[9] See *Sen. Exec. Docs.*, 48 Cong., 2 Sess., **1**: no. 40.
[10] *Ibid.*, p. 56.

growth of the mail service, stimulated by improvements in the latter made about the year 1865, there became manifest a necessity for better ways of paying the railways; for there had been no change in this matter since 1845. In 1869 and 1870 the attention of Congress was called to the subject. The railway companies had refused to give the facilities desired on the ground of inadequate pay, and numerous complaints of inefficient service were being made.[11] Annoying difficulties met the department.

A Period of Much Regulation of the Mail Service Begins: 1870

Accordingly, in 1870, we find a bill introduced, the object of which was to require railways to receive and deliver the mails.[12] Having been read a first and second time, the bill was referred to the committee on post office and post-roads; but no further action was taken.

In this same year it was enacted that corporations should carry the mails in the District of Columbia when requested; the rates to be determined, in case of disagreement, by three commissioners appointed by the supreme court.[13]

This period was one of great discussion concerning reasonable compensation for mail transportation, several reports and acts bearing on that subject being found. By 1873 there were over 63,000 miles of railway post-routes, and, in round numbers 65,621,000 miles of annual mail transportation at an average cost of 11 cents a mile. Such being the extent of the service and the amount of the funds involved, it is little wonder that the private interests of the railway corporations brought them into conflict with the government,—especially, when it is remembered how slightly developed was the social side of the railway business.

In 1872 the "Post Office Act" was passed—a law consolidating, revising, and amending statutes relating to the department.[14]

[11] *Ibid.*, p. 64.
[12] *Cong. Globe*, 1870-71, p. 129.
[13] *Statutes at Large*, **16**: 115, s. 36.
[14] *Ibid.*, **17**: 309, ss. 210-214.

It re-enacted the maximum rates and classification of routes of the law of 1845,[15] with the additional provision that if one-half the service on any road was required at night, 25 per cent. additional payment might be made; and the postmaster-general might allow such compensation for *railway post office cars* as he might think fit, up to 50 per cent. of the authorized rates. On the other hand, it was flatly enacted that all land-grant roads should carry mails at such rates as Congress should provide, the postmaster-general to fix them in the interim. And a proposition or threat made by Senator Benton nearly forty years earlier[16] was incorporated, to the effect that if contracts could not be made at the legal rates the mails might be divided and the letters forwarded by horse express or other means, the remainder going by wagon at less speed,—and this in 1872!

The following year a different basis of payment for railway post office service was provided, distance and space occupied being substituted for weight.[17] Proper furnishing, heating, and lighting were also required.

At this time the great bone of contention seems to have been the compensation paid for hauling post office cars, the demand for which was rapidly growing. The chief complaints of the companies are: (1) the compensation received for post car service is insufficient; (2) we are required to carry mail between stations only a quarter of a mile apart; (3) payment is made in orders on various post offices; (4) we carry a large number of government employees besides mail clerks and messengers; (5) and we are held liable in damages for injuries to persons in charge of the mails. A committee which took up these complaints decided that, while the rates then paid were too low, the demands of the railways were unreasonable; and, as regards the other points, with the exception of the second, the practices complained of were justifiable and warranted no change.[18]

The post office car part of the railway mail service appears to have been regarded with some suspicion by Congress. In 1878, for example, when $150,000 was appropriated to cover a defi-

[15] Above, p. 202.
[16] *Bul. of U. of W., Econ. and Pol. Sci. Series*, **3**: 262.
[17] *Statutes at Large*, **17**: 559.
[18] *Sen. Rep.*, 1873-74, no. 478.

ciency in the railway mail service appropriation, it was done upon the condition that no increase in the postal car service be made;[19] and in the act making an appropriation for inland mail transportation by postal cars, passed in 1879, Congress provided that the postmaster-general should thereafter separate the estimate for postal car service from the general estimate, and that he should report his reasons for making any increase or decrease in postal car service.[20]

The necessity for this kind of mail service, however, was recognized, and in 1881 a law was passed which, after appropriating $1,426,000 for it, provided that if any railway should fail to provide railway post office cars when required (and provide suitable safety appliances) its pay should be reduced 10 per cent.[21]

No change was made in the payment for general mail service till 1876.[22] Then a 10 per cent. cut was made in the rates for mail service on the basis of average weight as provided in 1873. Furthermore, it was provided that railways which had received land grants on condition that they carry the mails at such rates as Congress might direct should be paid but 80 per cent. of the general rates.

Finally, in 1878, the postmaster-general was directed to readjust the compensation for railway mail transportation by reducing the rates 5 per cent. from those authorized in 1876.[23]

Report of the Senate Sub-Committee on the Postal Service: 1874

The committee referred to above as taking up the complaints of the railways concerning postal cars was a sub-committee of the well-known Senate select committee on transportation routes to the seaboard. The Senate had resolved that the committee report on the nature and extent of the obligations subsisting between railway companies and the postal service, and whether

[19] *Statutes at Large*, **20**: 259.
[20] *Ibid.*, **20**: 357.
[21] *Ibid.*, **21**: 375.
[22] *Ibid.*, **19**: 79, 82.
[23] *Ibid.*, **20**: 142.

legislation was needed to guard the postal service against interruption or injury by hostile action on the part of the railways; and the committee took much evidence from the principal eastern roads.

The report opens with the following questions: "First, can the government of the United States, under this delegation of power [the post roads clause of the constitution], compel the transportation of its mails over railroads owned by private corporations without their will, and if so, secondly, in what manner and on what terms may the compulsory process be rightfully invoked?" These questions recall that propounded by President Jackson in 1835,[24] and indeed they are strikingly similar. And when it is further reflected that a short time ago (1907) President Roosevelt and others were reported to be considering the power to establish post-roads as the means for an extension of the power of this same government of the United States over the railways, the significance of the committee's question, and of the whole subject of the mail service and regulation, becomes apparent.

The report concludes that the right to establish necessarily conveys the right either to *make* a new road or to *designate and use* one already made, provided just compensation be made where private property is appropriated.

Concerning the latter of the alternatives—which is probably the only one that was seriously considered—the committee goes on to argue that as *common carriers* the railways are bound by certain reciprocal obligations to carry the mails as they would carry freights, for any shipper on equal terms. The government may "authorize the post office department to demand of all such companies the transportation of its mails upon payment of what is a reasonable compensation, or of a sum equal to that paid by other parties for services of a like nature." Furthermore, regarding railways as *public highways*, the government might use its right of eminent domain; for the express power to establish post offices and post-roads implies the power to adopt any means "which," to use the words of Marshall in McCulloch vs. Maryland, "might be appropriate and conducive

[24] *Bul. of U. of W., Econ. and Pol. Sci. Series*, 3: 260; reprint, vol. I, p. 94.

to the end." Finally, frankly putting the question, "has Congress, then, exercising its right of eminent domain, the power to take for the purpose of transporting the mails—and paying just compensation therefor—a railway within a state, without the consent of either the owner or the state?" the committee answers, "We are clearly of the opinion that it has." [25]

Here, however, as in the case of so many reports, no immediate result followed in the shape of legislation. The significance of the foregoing lies in the light it throws on the attitude of at least a part of Congress and the people towards railways, and in the effect such reasoning must have had upon others.

That the committee did not voice the belief of all congressmen is clear from a bit of debate which occurred in 1882. In that year, Mr. Robinson (Mass.) denied that Congress could compel railways to carry mails upon its own terms. Congress could propose terms; the railways might take them or refuse at their pleasure. To this assertion Mr. Cannon (Ill.) replied, "I think we are at liberty to compel common carriers. Does not the gentleman from Massachusetts believe that we have the power to compel railroads to carry the mails by proper legislative proceedings and enactment?" Mr. Robinson: "That is a very large question; we have not come to that yet. As I look about the House I see gentlemen very significantly smile at the proposition. I will let it stand for what it is worth." [26]

This clash illustrates not only that some denied the right of Congress to compel railways to carry the mails, but also the existence of sectional difference of opinion on the matter,—the West holding for the broader interpretation of governmental powers; the East for the broader interpretation of the rights of private property in railways.

The Post Office Appropriation Bill of 1882; Special Railway Facilities; Subsidized Lines

The measure concerned in the discussion just quoted was the post office appropriation bill for the year ending June 30, 1884, and the debate upon it is an interesting and important one for

[25] *Ibid.*
[26] *Cong. Rec.*, 1882-83, 14: 294.

the congressional history of railways. The bill proposed to reduce postage to two cents and to cut postal expenditures by several hundred thousands of dollars, the heaviest reductions falling in postmasters' salaries and special railway facilities. This latter item was to be cut largely because of inability to secure the desired facilities to the West and Southwest (some said this argument was insincere), the proposed special service from New York to San Francisco being blocked, for example, by the refusal of the Chicago–Omaha roads. The railways based their refusal on the fact that under the special facilities arrangement the postmaster-general fixed their schedules and required about forty miles an hour.[27]

Perhaps the chief issue in the House was the proposition, amendatory to the bill, to grant $600,000 as a fund for necessary and special railway facilities. The special facilities arrangement seems to have given satisfaction to neither party concerned: the railways constantly complained of insufficient compensation and the difficulty of keeping the schedules fixed by the post office department; while congressmen stated that these corporations had made the transportation of the mails their most profitable business. It was freely charged in Congress that the fund was used to subsidize New York newspapers and three eastern railways.[28] The arrangement was maintained through threats from the railways to withdraw facilities, and some bitterness was shown in attacking them during the debate. But beyond doubt it brought considerable progress in the rapidity and efficiency of the mail service,[29] and it was commended by contemporary postmaster-generals.

Those opposed to the proposition argued that this was merely a bribe fund; that the law already provided that mails must be carried on the fastest trains, when desired, upon penalty of a

[27] *Ibid.*, p. 296. By the "special facilities fund," as it was generally called, is meant an appropriation made by Congress in 1877, and continued thereafter, to be used by the postmaster-general for securing special facilities in the way of rapid mail service on the trunk lines. This action followed the abandonment of fast mail trains on the New York Central in 1876 caused by the decrease in mail payments made that year. The fund in 1877 amounted to $150,000 (*Statutes at Large*, **19**: 384) and was increased in succeeding years up to $600,000.

[28] *E. g.*, *ibid.*, p. 3293,—New York Central, the New Haven, and Penna.

[29] *Sen. Exec. Docs.*, 48 Cong. 2 Sess., no. 40, p. 106.

5 per cent. cut in the compensation; that the fund merely sugar-coated this law for a few railways running out from New York City. The amendment was lost by a vote of 29 to 91.[30]

The appropriation bill only passed the Senate with several amendments, among which was a provision for a $185,000 special facilities fund.[31] The House non-concurred;[32] but finally, having conceded minor points, and after several conferences, the bill was passed as amended by the Senate.[33]

Another important question concerned payment for mail transportation on subsidized railways. Sometime previously a law had been passed providing that land-grant railways should receive but 80 per cent. of the usual rate of payment for carrying the mail. In the case of the Union Pacific and Central Pacific railways, however, the supreme court had decided that the law did not apply; so these roads were receiving credit for high rates. After considerable discussion the House passed an amendment to the effect that all acts authorizing railways which had received aid by loans or guarantee of bonds in addition to land grants,—*i. e.*, the Union and Central Pacific railways,—should be so altered that the rates of compensation for mail service should be fixed by the postmaster-general; and they should not exceed those fixed by him or allowed by law for other roads of the same class which the United States had aided by land grants or otherwise.[34] The Senate, however, amended the House bill by striking out this provision and the House was ultimately forced to concur. So the Senate defeated the majority of the House on both these hotly contested points; and, on the whole, we may say that the railway interests won.

Summary

The foregoing is perhaps sufficient to give a fairly adequate idea of the more important relations existing between Congress

[30] *Ibid.*, p. 377.
[31] *Ibid.*, p. 1384. (This was the amount actually paid by the postmaster-general for special railway facilities the previous year.)
[32] *Ibid.*, p. 1804.
[33] *Ibid.*, p. 3592.
[34] *Ibid.*, p. 487.

and railways in the mail service point of contact,—though there were many other bills and reports concerning the basis for compensation, securing facilities, preventing delays, classifying railway employees, etc.

Two general conclusions have become clear and are noteworthy. In the first place, since 1850 the mail service relation has ceased to be one predominantly of aid, and has become one of regulation. In the second place, the importance of this subject to the history of railway regulation in general is apparent. Congress was trained in regulation; expression was found for an attitude of hostility towards railways and their abuses. This attitude was plainly aggravated by the independent action of the railways; and the act regulating inter-state commerce with which the period now under discussion closed was to some extent due to the folly of the railways in not settling down to a realization that, in so far as the mail service was concerned at least, they were the servants of the public,—that cheap and speedy postal arrangements must be had.

The fact that the railways of the United States are the carriers of the nation's mail has contributed to their control by the nation is evidenced by the titles of such bills as, "a bill to facilitate commercial, postal, and military communication"—which became a law in 1866,—"a bill to promote commerce among the states and to cheapen the transportation of mails and of military and naval stores," and a bill for "regulating fares . . . on all railroads or stage lines carrying the United States mails."[35]

The above sketch affords, by way of analogy, an argument against the idea that the commerce clause of the constitution does not justify *railway* regulation. This idea was held by some congressmen as late as 1880, and recently a recrudescence has appeared.[36] Practically no doubt has been raised as to the application of the post-roads clause to railways even from the earliest times; and surely interstate exchange and intercourse by railway are as much "commerce" as a railway is a "post-road." Both clauses of the constitution were written before

[35] *Cong. Globe*, 1871-72, p. 499.
[36] Prentice, *Federal Power Over Carriers and Corporations*, 1908.

the railway era; and in both capacities the railway is simply a new and developed instrument.

While there can be no doubt that the fact that the railways carry mails has *contributed* to their regulation, yet there is little support in history for a more direct general regulation on that ground. With the exception of a few mere propositions like those of Jackson and the Senate committee nothing approaching general regulation has directly resulted; while it is apparent that even these propositions were called forth by specific abuses in the mail service, their one object being to do away with such abuses. Indirectly more or less control might be exerted over railway operation through regulation of the mail service; but the power to establish post-roads does not seem sufficient basis for a general regulation of carriers as such.

PART II

THE APPLICATION OF THE "COMMERCE CLAUSE"

CHAPTER XVII

CONGRESS AND STATE MONOPOLIES: NEGATIVE REGULATION OF INTERSTATE COMMERCE

The early history of the United States is characterized by a looseness of federation and a commercial jealousy of one another which we, living in a period of rapid centralization, find it somewhat hard to realize. Massachusetts and New York, as though unrelated and independent sovereignties, levied taxes on aliens arriving in their ports; and Pennsylvania and Virginia claimed the right to regulate traffic across the Ohio river. This condition found expression in the monopolies that were granted to private interests by certain states: New York, for example, gave a monopoly of transportation over the Catskill–Unadilla road which restricted such interstate commerce as passed over it,[1] and another of steamboat transportation to Livingston and Fulton in 1803; and, in 1813, New Jersey retaliated by conferring similar privileges upon Ogden and Dod. Connecticut monopolized trade between New York and New England.[2] Moreover, the years following 1830 were marked, in their political aspect, by a tendency of the states to react against the nationalistic trend which came after the War of 1812 and to extend the scope of their sovereignty.

Down till about 1850, when general or "free" railway laws began to be passed, the jealousy of the states in guarding their

[1] Act of March 28, 1805, ch. 49, p. 70.
[2] See Perrin vs. Sikes, 1 *Day* 19, Conn., 1802.

own interests was frequently expressed by refusing charters to railways which would have benefited rivals.[3]

The Camden and Amboy Monopoly

This tendency had its important economic results. In line with the times was the action of New Jersey in 1832 when she passed a law concerning the Camden and Amboy railway which contained the following provision: "That it shall not be lawful, at any time during the said railroad charter, to construct any other railroad or railroads in this state, without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative."

By these words New Jersey riveted upon herself a monopoly from which she suffered much and long, receiving relatively little in return;—but it is not to be forgotten that her action was according to the spirit of the time, nor that great inducement was necessary to cause capital to take up such a venture. For nearly twenty years this monopoly maintained itself by wholesale corruption, and even force, almost unchallenged;[4] and only in the early Sixties, when the war made its operations a national grievance were important steps taken to abolish it.

So firmly was the monopoly seated in the state that the only hope seemed to lie in national action, and such action might plainly be sought on several grounds: either the power to establish post-roads, military necessity, or the commerce clause might be invoked.

The House Votes to Break the Monopoly

A bill which came up for discussion in 1864 in the House was, by its title, based on all three of these grounds.[5] Its purpose

[3] See Ringwalt, *Trans. Systs. in the U. S.*, p. 148.

[4] See *North American Review*, **107**: 428–476 for full account; and *Bul. of U. of W., Econ. and Pol. Sci. Series*, **3**: 244, and note; reprint, vol. I, p. 78.

[5] *Cong. Globe*, 1863–64, p. 1165.

was to declare a local New Jersey railroad, the Raritan and Delaware Bay, a lawful structure and a post and military road, thus enabling it to compete with the Camden and Amboy lines for through traffic between Philadelphia and New York, in spite of the state's exclusive charter and an injunction which the Camden and Amboy company had recently obtained in the New Jersey courts. Not only had the Raritan and Delaware Bay been enjoined against engaging in through transportation, but it had been ordered to turn over to the Camden and Amboy the payment received by it for the transportation of troops and supplies under orders from the government quarter-master, issued when the government was pressed for transportation and had found the Camden and Amboy inadequate.

In advocating the bill Mr. Deming (Conn.) said that two questions arose: First, had Congress the power to interfere to relieve the enjoined railway, and second, was it expedient? Mr. Deming and the committee which he represented believed that Congress did have the power, and that under two clauses of the constitution: "the clause which authorizes us to establish post-roads; and, second, under the clause which authorizes us to regulate commerce with foreign nations, among the several states, and with the Indian tribes."

Mr. Starr (N. J.) thought it to be a duty he owed his constituents and the state he represented to oppose the bill.[6] He urged that the Raritan and Delaware Bay in taking their charter knew it was subject to the limitations imposed in 1832 and had tacitly agreed to the Camden and Amboy monopoly privileges—privileges secured by a charter which was in the nature of a contract and affirmed and reaffirmed by the contracting parties and the courts—privileges in the nature of vested interests. Would the House, in the face of such considerations, interfere to deprive the state of control over her own corporations?

Furthermore there seemed to him no necessity for the step proposed, for under existing laws the president could take and operate any railway required for military purposes.[7]

Finally he charged the whole movement was a scheme for

[6] *Ibid.*, p. 1237.
[7] See above, p. 157.

enriching the English bond-holders of a new line, a charge admirably adapted to prejudice men of that time against a measure.

Mr. Rogers[8] (N. J.) after reiterating the arguments of his colleague, emphasized the state sovereignty idea. He said, "There is no warrant in the constitution of the United States that will allow Congress through her representatives from other States of this Union to interfere with the local railway system of any individual State which it has incorporated merely for the purpose of doing business within its limits. . . . It is a question which interests the State of New Jersey and the whole railway system of the Union, because it is to settle whether the States shall regulate their own railroad, canal, turnpike, and other transportation systems, or whether they shall be regulated by the Congress of the United States."

Mr. Perry (N. J.) next took up the opposition to the bill, emphasizing that another line of railway between New York and Philadelphia was unnecessary.[9]

Continuing in a similar strain Mr. Broomall (Pa.) argued somewhat heatedly.[10] He was concerned over what he called the "amphibious" character of the company if the act should be passed—it would be subject to neither state nor national jurisdiction. He denied that the United States had anything to do with the Camden and Amboy corporation. For Congress to sit in judgment upon it would be an "unwarranted and unprecedented folly." He went further and denied the abuses charged to the monopoly, asserting its fares to be lower than ordinary for similar distances.

Mr. Broomall said that if a corporation was wanted Congress should charter one directly so that it would be under federal control; and Mr. Brown (Wis.) was inclined to think this the only means of remedying the situation.

But, meanwhile, Mr. Davis (N. Y.) and Mr. Garfield (O.) had brought heavy artillery to bear on the opponents of the bill. They openly accused the monopoly of controlling the people,

[8] Mr. Rogers was well known to be the monopoly's agent in the House. He was shortly afterward defeated for re-election.

[9] *Ibid.*, p. 1253 seq.

[10] *Ibid.*, p. 1263.

courts, and legislature of New Jersey, and of electing New Jersey's representatives in Congress; Mr. Davis did not expect anyone from that state would arise to support the bill. It followed from these facts that the new line had no prospect of continued existence save through the interposition of Congress, when their rights might be adjudicated by the federal courts.

To these men, too, the question of state sovereignty seemed the important one. The representative from New York held the federal government absolute and supreme for every purpose for which jurisdiction was expressly given or implied by the constitution, and among these grants was the power to regulate interstate commerce. Mr. Garfield stated that the power to regulate commerce between the states had been repeatedly declared by the courts to reside exclusively in Congress and not in the legislature of any state.

At this time there were not a few who thought railway transportation did not fall under the term "commerce," as used in the constitution, and the words of Mr. Yeaman (Ky.) are interesting in this connection, as well as in the ground taken for the power of Congress in the premises. "The power to regulate commerce is the same whether that commerce be carried on through natural or artificial channels. Can a state control, regulate, or prohibit the use of a river running through its midst, levy a tribute on tonnage, and then direct that commerce shall go no other route? It may be answered that nature made and located the river and conferred natural rights, but capital and skill built and located the road, and the state granting the right of way and corporate powers, did it on conditions. To this I reply that just so far as these conditions are inconsistent with the power of Congress to regulate commerce between the states, they are not binding, and the case is the common one where the grant is valid and the conditions void."[11]

Now, all this argument was directed toward removing certain alleged abuses and was negative in its ends. Its application depended upon questions of fact as to the operation of the monopoly concerned. In spite of denials, three charges against the state of New Jersey and the Camden and Amboy interests seem

[11] *Ibid.*, p. 2257.

pretty well sustained: first, a tax was levied which bore most heavily upon residents of other states; second, the service was poor and the fares were high; third, confining traffic to a single line made transportation facilities through New Jersey inadequate and amounted to an obstruction of interstate commerce. To substantiate the first point Mr. Davis cited the Camden and Amboy's 1848 report to show that in May it had carried way-passengers at an average charge of $1.75, while through passengers had paid an average of $3.55; and he and others stated that New Jersey had received over two and one-half millions of dollars up to 1862, the entire civil list of the state being more than paid for by taxes wrung from the travellers of other states. In support of the second point Mr. Garfield read rate statistics as follows:

New York to Philadelphia, 90 miles	$3 00
Harlem to Albany, 154 miles	3 00
New Haven and Hartford to Meridan, 94 miles.	2 34
New Haven and New London to Guilford, 94 miles	2 35
Hudson River to Rhinebeck, 91 miles	1 80
Erie to Port Jarvis, 87 miles	2 10

As to the third point, there can be no doubt that the transportation facilities were very poor, notwithstanding the assertions of New Jersey's representatives to the contrary. The post office department, the war department, and the commercial interests of New York all complained, and, as Mr. Garfield said, "Everybody knows that there is scarcely to be found in the United States railroad facilities between any two important cities so inadequate as those between New York and Washington."

As it finally passd the House the bill was amended so as to be general in its scope.[12] After the enacting clause these words were inserted: "That every railroad company in the United States whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon and over its road, connections, boats, bridges, and ferries, all freight, prop-

[12] *Ibid.*, p. 2264.

erty, mails, passengers, troops and government supplies on their way from one state to another state, and to receive compensation therefor." The House vote stood 63 for this bill, with 57 opposing. The Senate refused to discuss the bill or bring it to a vote, and it was carried over to the following session.

The Senate Refuses to Interfere

At the following session, 1864–65, however, the Senate resumed consideration of the bill.[13] In the discussion little was added to what has been cited from the House debates. The speakers for the state monopoly dwelt upon inviolable contracts, vested interests, and constitutional limitations, going back to the days of Madison and Monroe for their ammunition. They argued that the power to "establish" post roads was limited to designating roads already existing, etc.; but the crux of the matter—the question as to whether this monopoly actually was obstructing commerce between states—was not satisfactorily dealt with. It would hardly seem adequate as a defense of a case of state interference with interstate commerce to point to the fact that Congress in chartering the Pacific railways acted only for the territories, expressly turning to the states for the construction of the line through their spheres, or to mention other instances of state taxes on traffic, as did Senator Ten Eyck (N. J.).[14]

On the other hand Mr. Sumner (Mass.) made a very strong speech in favor of the bill.[15] He took the ground that the unity and integrity of the Republic were involved in this issue, referring to the monopoly as a "usurpation with all the pretensions of state rights, hardly less flagrant or pernicious than those which have ripened into bloody rebellion." His chief contention was for power under the commerce clause and it is significant as being an early statement of the interpretation of the constitution in this matter which later came to be the prevailing one. The case of Gibbons vs. Ogden, in which the Supreme Court decided against the power of New York to grant a steam-

[13] *Ibid.*, 1864–65, p. 328.
[14] Ibid., p. 814.
[15] *Ibid.*, p. 790.

boat monopoly, was cited to the effect that the power of Congress over interstate commerce does not stop at state lines; that, if Congress has the power to regulate, that power must be exercised wherever the subject exists; and that every State has the right to participate in such commerce.[16] And he held that this applied to internal commerce by rail as well as by water. A later decision by Justice Story which he quoted is perhaps less well known. Referring to the power of Congress over commerce that eminent judge said: "It does not stop at the mere boundary line of a State; nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land as interfere with, obstruct, or prevent the free exercise of power to regulate commerce with foreign nations and among the States."[17]

As to the post-roads clause, Justice Story was again turned to with approval, and a passage from his *Commentaries* was indeed apropos. "Let a case be taken," writes the judge, "when State policy or State hostility shall lead the legislature to close up or discontinue a road, the nearest and the best between two great States, rivals, perhaps, for the trade and intercourse of a third State; shall it be said that Congress has no right to make or repair a road for keeping open for the mail the best means for communication between those States? . . . In other words, have the States the power to say how, or upon what roads, the mails shall and shall not travel? If so, then, in relation to post-roads, the States and not the Union are supreme."[18]

Mr. Sumner concluded his argument by maintaining that the power to raise an army carried with it the right to authorize the agencies required for its transportation.

Full of significance for the historian is the statement made by this same senator in explanation of the relatively slight use as yet made of the commerce clause. He said that this power had always been used with peculiar caution, because of the extreme sensitiveness of the states concerning their sovereignty; but, he prophesied, "it still lives to be employed by an enfranchised government."

[16] 9 *Wheaton*, 196.
[17] U. S. vs. Coombs, 12 *Peters*, 78.
[18] Story, *Commentaries*, 2: sec. 1144.

Apparently the extreme caution continued in the Senate; for that body refused to follow the House and postponed the bill indefinitely by a vote of 14 to 21.[19]

Pennsylvania Obstructs Interstate Railway Project

In 1851, just before the passage of her general law, Ohio passed an act incorporating the Cleveland and Mahoning Railroad Company, and authorized it to build a railway from Cleveland to Youngstown and thence to the Pennsylvania boundary line. The same interests secured a charter from Pennsylvania in 1853, authorizing them to continue the road into Pennsylvania and on to Pittsburg. Thus the company, holding charters from two states, had a direct line from Cleveland to Pittsburg and thence by way of the Pittsburg and Connelsville line through Cumberland and the Point of Rocks to Washington. With funds all raised and sixty-seven miles of line completed, the Pennsylvania legislature sat and in May, 1864, repealed the charter for the Pennsylvania portion of the road, robbing it of its eastern terminus. Though there was some pretext of an expired time limit, the true reason is doubtless to be found in the machinations of the Pennsylvania Central railway company, which company occupied a position of control in the state not dissimilar to that held by the Camden and Amboy in New Jersey; for we are told that when a representative from the Cleveland and Mahoning visited the Pennsylvania legislature to secure redress he was referred to the railway president (!) who informed him that the charter might be restored if he would run the Ohio road so as to connect with the Pennsylvania Central and so turn its traffic into that channel.[20] Not choosing to do this the Cleveland and Mahoning, like the Raritan and Delaware Bay, turned to Congress for relief.

[19] *Ibid.*, p. 1394. 15 being absent. The bill was first amended as follows: "That no citizen of the United States shall be excluded from travel upon any railroad or navigable water within the United States, nor from any meeting-houses, churches, or hotels, on account of or by reason of any State law or municipal ordinance, or of any rule, regulation, or usage of any corporation, company, or person whatever;" and a fine of not less than $500 or imprisonment of not under six months was to be the penalty.

[20] *Cong. Globe*, 1865-66, p. 2922.

The House Votes to Break Pennsylvania Obstruction

At the session of Congress following the Senate's refusal to act in the case of the Camden and Amboy, and some two years after the vote of the House to prevent such monopolies, an Ohio representative, Mr. Garfield, introduced a bill to afford the desired relief.[21] This bill authorized the Cleveland and Mahoning to continue and construct its railway from the village of Youngstown to and into the state of Pennsylvania and thence by the most advantageous and practicable route to Pittsburg, and established it as a military, postal, and commercial railway of the United States. It provided that the rights of the company should be guaranteed to it by the Congress of the United States, and in case of litigation it should have recourse to the federal courts.

The usual arguments were brought against the bill by Mr. LeBlond (O.). He stated his fear lest the measure should become a stepping stone to the formation of great congressional incorporations. The bill seemed to him to strike down the rights of the states, and to be an entering wedge of centralized government. And he accused Mr. Garfield of making use of the extensive employment of the military power during the past five years to incorporate a provision reserving to the government power to use the road for military and postal purposes, and so justify an otherwise indefensible measure.

Mr. Moorhead (Pa.) and Mr. Garfield both thought Congress should interfere, the latter stating his belief that the time had come for the general government to use the power clearly vested in it under the right to regulate commerce among the states, and not to allow states to block the free intercourse necessary to industrial growth and political unity.

The bill passed the House 77 to 41, 65 not voting. It does not appear to have been brought up in the Senate.

A similar bill concerning the Pittsburg and Connelsville railway was introduced about this time[22] but failed to pass the House. This company had evidently taken its case to the United

[21] *Ibid.*, p. 2903.
[22] *Ibid.*, p. 2902.

States circuit court which declared the repeal of its charter to be unconstitutional. Obstructive and harrassing litigation was then begun in the state courts.[23]

Bill to Facilitate Communication Among the States Passed: 1865

All during the preceding debates House bill number 11, entitled "A bill to facilitate commercial, postal, and military communication among the several states," had been pending. Introduced by Mr. Garfield (O.) it was referred to the House committee on commerce and early in the session was reported back with the recommendation that it do pass.[24]

The wording of the bill was practically identical with the one concerning the Camden and Amboy, passed by the House in 1864.[25] It authorized any steam railway to transport passengers and freight on their way from one state to another state, and receive compensation therefor. Nothing new seems to have been brought up in opposition to the bill. It was recognized that while it was general in its terms it was directed to conditions in New Jersey, Pennsylvania, and Maryland. In the House the bill was ordered to be engrossed and read a third time by a vote of 93 to 51, 38 not voting, and was then passed unanimously.

In the Senate the bill was debated at some length and important amendments were incorporated. As these amendments entirely altered the scope of the bill and throw much light on the railway-regulation ideas of the Senate it will be well to give them attention. Mr. Clark (N. H.) was their author. He first moved to strike out the word "connection" from the list of transportation agencies to be regulated, in order to prevent the act being so interpreted as to give one railway the right to operate over another one connecting with it. The amendment was agreed to without apparent opposition.[26] Yet today we think it right that railways be compelled to join and pro-rate,

[23] *Ibid.*, p. 2903 ff.
[24] *Ibid.*, p. 82.
[25] Above, p. 215 f.
[26] *Ibid.*, p. 2870.

and the amendment would certainly weaken the act by leaving it possible to refuse through connections.

Mr. Clark's next amendment provided that no new railway or connection should be built without the consent of the state in which it was to lie. Meeting with some opposition, Mr. Clark asked if it were the intention to authorize anyone to build a road within a state without that state's consent, and Mr. Chandler (Mich.) replied that this was not the intention; he explained the object of the bill to be "to compel any state to permit the traffic of other states to pass through it, *if there be an open channel.*" The amendment was passed by a vote of 24 to 15.

Now Mr. Chandler was chairman of the committee on commerce, but his statement of the meaning of the bill varied decidedly from that of some of his colleagues and from that attached to it by the House. Mr. Sherman (O.) complained bitterly that the bill was being shorn of its chief feature.[27] He had wanted additional powers conferred upon certain railway companies in order to facilitate commerce among the states; but the bill, as amended, gave no powers not possessed under state charters. Ohio and the West were being blocked in the effort to market their produce by the state of Pennsylvania. There had been almost a little war in the effort to get through Erie,[28] and the Pennsylvania Central was the only route through the state.

Mr. Sumner (Mass.) also regretted the amendment, but thought the bill better than nothing in that it attacked the monopoly of New Jersey, "which was in view when the bill was presented." It would also furnish a precedent for future action. Mr. Howe (Wis.) was perhaps most radical of all in his argument for the power of Congress. Indeed, being asked if Congress had power to regulate tolls on commerce he replied, "that we have the power to regulate tolls in some way, if it be necessary, I have no more doubt than I have of our right to make appropriations,"—thus taking advance ground on the question of rate regulation. He held that Congress had the power to regulate commerce on the railways of New Jersey and

[27] *Ibid.*, p. 2871.

[28] See Spearman, *Strategy of Great Railroads*, pp. 277-287.

that the power of the several states to impose terms upon companies constructing railways must be subordinate to congressional power to regulate commerce.

Senators Morrill (Me.), Fessenden (Me.), and Davis (Ky.) opposed the bill on strict construction grounds. They believed that when a state had constructed an improvement and thus increased facilities for commerce, it belonged to the state and there was no reason for government interference. Mr. Davis held that, while the state had no jurisdiction over interstate commerce, the only way in which Congress could constitutionally interfere was by constructing a road of its own.

It may be said that in general the opposition stood for *laisser faire*, individualism, and a narrow interpretation of the constitution; and the burden of their plea was for Congress to keep its hands off, for this was a question for the courts. The states alone could authorize the construction of railways within their bounds; hence they could impose such restrictions as they saw fit.

As amended, the act was finally passed with 22 ayes to 19 noes.[29]

[29] *Ibid.*, p. 2876. An analysis of the vote by sections gives the following result:

State.	For.	Against.	State.	For.	Against.
Maine		2	Ohio	2	
New Hampshire	2		Indiana	1	1
Vermont	2		Illinois		1
Massachusetts	2		Michigan	2	
Rhode Island	1		Wisconsin	1	1
Connecticut		1	Iowa	2	
			Minnesota	1	1
New England	7	3	Kansas	1	
New York	1	1	Middle West	10	4
Pennsylvania		2			
Delaware		2			
Maryland		2	Nevada	2	
New Jersey			California	1	
			Oregon	1	
Mid. Atlantic.	1	7			
			Far West	4	0
West Virginia		2			
Kentucky		2			
Missouri		1			
Southern States	0	5			

Where 2 votes are not cast it indicates an absence, or, in the case of N. J., only one Senator held office at the time and was absent.

It simply authorized any existing steam railway to carry interstate traffic and to receive compensation therefor,—not to affect stipulations between the government and any railway for free transportation,—and did not prohibit a state from forbidding the construction of new railways. It would be effective against the Camden and Amboy's persecution of the Raritan and Delaware Bay, but would not remedy such situations as confronted the Cleveland and Mahoning.[30]

Kentucky Opposes the Entrance of an Ohio Railway

In 1869 the legislature of Ohio passed an act incorporating certain individuals as trustees for the city of Cincinnati with power to borrow $10,000,000 on the credit of the city for the purpose of constructing a railway from that point to Chattanooga.[31] The project, of course, involved a right of way across the state of Kentucky, which privilege that state refused, passing a tax law which would have killed the road; and, in 1871, a bill was brought up in the Senate for promoting the construction of the road, the Cincinnati and Southern, as it was called.[32]

The reason for Kentucky's opposition to the Ohio project was no doubt to be traced partly to the municipal jealousy which existed between Cincinnati and Louisville. Moreover, Kentucky

[30] The act was as follows: Whereas the constitution of the United States confers upon Congress in express terms the power to regulate commerce among the several states, to establish post roads, and to raise and support armies: Therefore, *Be it enacted*, etc., That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination: *Provided*, That this act shall not affect any stipulation between the government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company * * * ; nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the state in which such railroad or connection may be imposed. (p. 2871.)

[31] *Cong. Globe*, 1871, Appendix, p. 5; Williams, *Revised Statutes of O.*, **3**: 809. The act was general in its terms, but practically applied to Cincinnati alone. It provided for purchasing right of way and for taking land for bridge abutments.

[32] *Ibid.*, p. 52.

had herself chartered some five different railways between the Ohio river and the Tennessee line, and under these circumstances not unnaturally resented the intrusion of a foreign corporation.

Senator Davis (Ky.) made a long speech against the bill,[33] taking the ground that this was an unconstitutional interference with state affairs. This corporation of Ohio's was coming and asking Congress to pass an act handing over to it all the sovereignty, jurisdiction, and eminent domain of the state of Kentucky along the line of its railway to the extent of maintaining and governing it forever; Congress possessed no power to pass such an act.

The supporters of the bill won a point in getting it referred to the committee on commerce rather than the judiciary committee; but it was not passed at this session, and at the following session we find Mr. Sherman reporting that as Kentucky had recently passed a law on the subject, the bill had better be laid aside.[34]

Summary and Discussion

Briefly the events recorded in this chapter are as follows: New Jersey, having granted a monopoly of transportation across her territory to the Camden and Amboy, did not have adequate facilities to meet the exigencies of war; another route was used by the government and was punished by the state courts for that service; it appealed to Congress and the House passed a general bill to authorize railways to carry interstate traffic. At about the same time Pennsylvania revoked a charter to an Ohio railway for selfish reasons, and again, the House being appealed to, it passed an act authorizing the Ohio road to build into Pennsylvania. In both cases the Senate refused to concur with the House. Finally, in 1866, a general bill was passed to facilitate commercial, postal, and military communication among the

[33] *Ibid.*, appendix, p. 5 ff.

[34] *Ibid.*, 1871–72, p. 1950. The writer can find nothing concerning this matter. The road was built to Chattanooga and soon leased to the Cincinnati, New Orleans and Texas. The city of Cincinnati invested some $18,000,000 in the road and has received good returns.

states. This did not authorize railways to build into a state without its consent, and in 1871 Kentucky refused admittance to another Ohio company. A bill in favor of the company was not passed.

Perhaps the most significant feature of the congressional action in these matters is the use made of the power to regulate commerce among the states,—to that time the most extensive use made with regard to the regulation of railway transportation. The importance of the long debates over the power of Congress under the "commerce clause" of the constitution as an introduction to the regulation of interstate commerce is plain.

The prominence of the post roads clause is also noticeable.

The regulation resulting from the need of breaking state monopolies was entirely negative in character, that is, it did not positively, and in a substantive way, regulate interstate commerce; but merely broke down and forbade barriers to such commerce on existing railways. There were predictions of a more extended use of the power over interstate commerce, and the act of 1865 was referred to as a precedent along this line, but the act itself was negative.

The general occasion for the passage of this act may be said to have been the breaking up of the old, narrow state policies as to commerce. A report made in 1829 by the Pennsylvania senate on granting the right to a foreign railway to extend into the state is illustrative of the early conditions. It argued that, "The State of Pennsylvania has projected and is now carrying into execution an enlarged and comprehensive system of internal improvement, designed to furnish to its citizens the advantage of a cheap transportation and an easy access to market; *and to make its own city that market;* . . . and this great work, involving an immense expenditure, is to be constructed at the expense of the State; and it is asked of the legislature to give a rival city the privilege of intersecting these great improvements at a point within its own territory, for the purpose of conducting the trade from Philadelphia to Baltimore, to enable that city to reap the benefits of the system of internal improvements executed at the expense of this State, and to deprive the State of the revenue derived from the trade of its own commer-

cial city, and of the large amount of tolls which it is confidently anticipated will be derived from the great line of communication from Middletown to the city of Philadelphia.''[35] The war with its nationalizing influences, the development of an eastbound traffic in the West, the general railway expansion and accompanying commercial development—all these factors united at about this time to break down the narrow state policy. The growth of the railway mail service, too, might be mentioned in this connection.

The interests or sections which most strenuously opposed state obstructions were the post office and the war departments, the commercial interests of New England and New York, the agricultural sections of the West, and travellers to and from Washington city. The war brought longstanding trouble between New Jersey and Maryland railways and government departments to a head. New York merchants had long complained of the obstruction presented by New Jersey to their commerce with the South and West,[36] and New England was interested for similar reasons, as well as from her growing dependence upon the West for her food-stuffs.

Following the war there was a widespread reaction against corporations, monopolies, etc., which was turned toward railways in particular, a writer in the *North American Review* for 1867 dwelling upon the ''monopolizing tendency'' in the carrying trade, and holding it to constitute a problem on a par with that of southern reconstruction.[37] The shameless use of political power by the railways was also the frequent subject of comment.

[35] Ringwalt, *Trans. Systs. in the U. S.*, p. 148.
[36] See *Bul. of U. of W., Econ. and Pol. Sci. Series*, 3: 244.
[37] P. 429.

CHAPTER XVIII

FEDERAL REGULATION OF RAILWAY BRIDGES

In the case of bridges over navigable streams Congress has regulated railway construction in a direct and general way. The approval of plans by the secretary of war is required for bridges over navigable streams, and, where the rivers form the boundary between states, Congress has granted special charters. Such control has been based upon the commerce clause of the constitution.

Early Regulation: The Wheeling Bridge Case

One of the early leading cases of congressional regulation of bridges under the power to regulate commerce occurred just at the beginning of the second half of the century. It did not directly concern railways, but is important as a precedent. The bridge across the Ohio at Wheeling had been constructed under an act of authorization from Virginia.[1] It was built so low that the lofty chimneys of some river steamers could not pass under it and Pennsylvania brought suit against the company, claiming that her commerce was being obstructed. The supreme court declared the bridge an unlawful obstruction. Congress at once passed an act—in 1852—authorizing the bridge and setting aside the court's decision. It declared the bridge to be a lawful structure, established it as a post-road, and ordered steamboats to so adjust their smoke stacks as not to interfere with it.[2] Further litigation with the object of overruling the act of Congress ended in a decision of the supreme court which declared that Congress had full power under its right to regulate com-

[1] See 18 *How.*, 421, 442.
[2] *Statutes at Large*, **10**: 112.

merce to decide what was an obstruction and that the act was valid.

Prior to the Civil War, however, the bridge question was of relatively slight importance. It was only when western development made the bridging of the Mississippi and Ohio rivers essential that important congressional action began. For in those days the rivers were highways of much commerce, and great rafts and tall-chimneyed steamers were borne by them, demanding wide, unobstructed channels. The first bridge over the Mississippi river between Rock Island and Davenport, for instance, was a railway drawbridge built without the sanction of Congress, as was the earlier custom, and river transportation interests complained bitterly of the obstruction it presented. In the seventh decade came the beginning of the first important bridge legislation.

Ways in which Bridge Construction Has Been Regulated

In at least three ways the government has necessarily interfered in the construction of what is often an integral part of a railway system: it has in some cases practically required the construction of bridges; it has determined the location of these and others; and it has prescribed the kind, size, etc., of many more.

When Congress, in establishing the Union Pacific railway, provided that its eastern terminus should lie upon the western border of Iowa, it practically required a bridge across the Missouri river at that point. And the act of Congress granting land to Illinois provided for a railway to Dubuque, and Dubuque lay in Iowa; hence the force of the argument that it was evidently intended that a bridge should be constructed across the Mississippi river. In 1855 pressure was brought to bear upon the Illinois Central to make it carry out the intention.[3]

As an instance in which the government specifically fixed the location of a railway bridge, the one at La Crosse, Wis., may be mentioned. The railway was authorized to build a bridge over the Mississippi between La Crosse county, Wis., and Hud-

[3] *Sen. Docs.*, 1855-56, **10**: no. 39.

son county, Minn. In accordance with the act, the secretary of war located the bridge, which location proved undesirable to the railway and it petitioned Congress for permission to locate elsewhere.[4]

Many illustrations might be given of the way in which Congress prescribed the details of bridge construction. The most common provision concerned the length of spans, arches, or draws and height above the stream. Typical regulation of this description may be found in the case of the Chicago and Illinois Southern's bridge across the Big Wabash,[5] and in the "act to authorize the construction of certain bridges, and to establish them as post roads" passed in 1866.[6] The object of this supervision was, of course, to preserve the freedom of navigation and it was in the interest of inland water transportation.

Congress had more than one lesson to learn by experience. When the Chicago and Illinois Southern came before that body with a petition for bridge rights over the Wabash, Mr. Edmunds reminded his colleagues of their trouble with the Cincinnati bridge: here alteration to meet the demands of navigation had been refused unless the government paid for it. At his suggestion, the bill was amended to provide specifically, not only that the bridge should always be kept so as not to interfere with navigation, but also that it should be altered whenever Congress directed, and at the expense of the owners.[7]

Obstruction of the Omaha Bridge Attacked

In 1874 a bill was introduced which provided that the bridge constructed by the Union Pacific over the Missouri river between Omaha and Council Bluffs, together with its approaches on either side, should be held and operated as a part of the continuous line of the railway.[8] The reason for such a measure was this: the bridge had been operated by a nominally distinct company, the "Transfer Company," and as a result, traffic

[4] *H. Misc.*, 1872-73, no. 10.
[5] See *Cong. Globe*, 1870-71, pp. 1292, 1417.
[6] *Statutes at Large*, 39 Cong., 1 Sess., ch. 246.
[7] *Cong. Globe*, 1870-71, p. 1682.
[8] *H. Jr.*, 1874-75, p. 16.

was being interrupted and impeded by unreasonable restrictions. Passengers were compelled to transfer to the cars of the Transfer Company—which were not what they should have been—and to re-check their baggage, for which privilege a fee of fifty cents was exacted. To transfer a freight car over the river cost ten dollars. The evil of the situation was enhanced by the fact that these practices were in the nature of a discrimination in favor of Omaha, and it was charged that the city paid for the favors it received.

Such discrimination, it will be observed, tended to defeat the purpose of Congress to make the eastern terminus of the railway lie in Iowa.

No valid arguments were advanced against the passage of the bill, save the fact that the issue had already been taken to the circuit court for the district of Iowa and was thus under adjudication. On this ground, action on the bill was deferred. The case, which was a proceeding in mandamus to compel the Union Pacific to operate its railway as one continuous line was won by the government (ex rel. Hall et al.),[9] and, the necessity for it being gone, the bill was not again taken up.

Rates of Toll on Bridges Regulated

Reference has already been made to a law passed in 1866 and entitled, "An act to authorize the construction of certain Bridges and to establish them as Post Roads." It authorized any person or corporation, having authority from Illinois or Missouri, to build a bridge across the Mississippi at Quincy, and to lay tracks over it. All railways terminating here should be allowed to cross the bridge for reasonable compensation. Structural requirements were given, and the bridge declared a post route. Similar provisions were added for several other bridges, at St. Louis, Prairie du Chien, Winona, Keokuk, etc.

But the chief reason for mentioning this act here, is its provision concerning rates of charge on the bridges. It runs as follows: "No higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of

[9] See *H. Misc.*, 1875-76, no. 184, for text of the decision, and briefs.

war of the United States, than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge." This formula was commonly included in such acts.[10] Though of no great practical effect, the provision is not devoid of significance. It would mean decidedly lower rates for government transportation than those generally enforced in private service.

In 1873 a resolution looking toward more general and positive action than this was passed by the House. It was to the effect that the committee on railroads and canals inquire whether the rates charged by the Chicago, Rock Island and Pacific for the transportation of cars, freight, and passengers across the bridge connecting Davenport and Rock Island were reasonable, and, if not, what measures might be taken to make them so.[11] The wording of this proposition reminds one of later discussions. However, no further action in the matter seems to have been taken and no report was made.

Of wider significance, too, were certain clauses inserted in the act authorizing a bridge over the Missouri in Douglas county, Nebraska.[12] One provided for ways for wagons and pedestrians, for the use of which reasonable tolls as approved by the secretary of war might be charged. Section four contained these words: "and Congress reserves the right at any time to regulate by appropriate legislation the charges for freight and passengers over said bridge." This is a considerable step beyond the regulatory provision of the act of 1866.

A reason given for the authorization of this same Douglas county bridge was the desirability of competition. A committee report stated that, on account of the great traffic at Omaha,—one thousand car-loads of freight per week,—a bridge should be erected by another company than the one having the then existing bridge in charge, "for the accommodation of commerce, and the reduction of tolls incident to competition."[13]

The provision in the act of 1866 requiring equal treatment of all railways desiring to use the bridges concerned is typical.

[10] *E. g., Cong. Globe*, 1871, pp. 610, 627.
[11] *Cong. Rec.*, 1873–74, p. 346.
[12] See *Ibid.*, 1883–84, pp. 4182, 5117.
[13] *H. Rep.*, 1883–84, no. 1334.

An act of 1868, for instance, required the same privileges for all railways; but this act makes the significant regulatory exception that if any railway should refuse to check baggage or "commute" fares with all railways north or south,—the bridge crossed the Potomac at Georgetown,—the right to the bridge should be denied it.[14]

Congress Authorizes a Bridge in Spite of State Laws

The Wheeling bridge cases mentioned above were decided at a time when to most men commerce meant navigation. And in Hatch vs. Williamette Bridge Co. the court based the power of Congress to authorize bridges upon its control over navigable waters. But in Hughes vs. Northern Pacific (1883) a circuit court observed of this decision that it did not deny the right of Congress to bridge or authorize the bridging of navigable waters under its constitutional power to establish post roads or provide for the common defense; and in the last year of our period, a case was settled which involved the regulation of railways. On April 6, 1886, New Jersey, knowing that a bridge was to be constructed across Staten Island Sound, passed an act prohibiting the erection of bridges over any navigable or tidal water which separated it from other states, without permission from the New Jersey legislature. On June 16, of the same year, Congress enacted that it should be lawful for the Staten Island Rapid Transit Company and the Baltimore and New York Railroad Company to build and maintain a bridge across Staten Island Sound for the passage of railway trains.[15] The bridge was to be a lawful structure and a post route; the rates for transporting mails, troops, etc., not to exceed those on railways and roads leading to the bridge. Litigation involving the bridge was to be taken to the circuit court of the United States.

The Staten Island Company proceeded to build the bridge without getting New Jersey's authorization, and suit was brought against it. The case hung upon the power of Congress

[14] *Statutes at Large*, 40 Cong., 2 Sess., ch. 26, s. 4. See above in chapter on Territories and District of Columbia.

[15] *Statutes at Large*, **24**: 78.

to authorize the construction of a bridge, the chief contention of the opposition being that private property was being taken—in the shape of land for the piers—without due compensation. The court, however, held that the power of Congress was ample and exclusive, being independent of the consent of the state; and it cited the taking of land for post offices as a precedent in point. Its opinion was concluded in these words: "We think that the power to regulate commerce between the States extends, not only to the control of the navigable waters of the country, and the lands under them, for the purpose of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient."[16]

Here then Congress authorized the construction of a railway bridge in spite of a state's prohibition, and its authorization was upheld as being constitutional under the power to regulate interstate commerce.

A Bridge Company Incorporated

A few years later Congress went further and incorporated a bridge company. An act of 1890 chartered the North River Bridge Company, authorizing it to build a bridge across the Hudson river between New York and New Jersey and to lay tracks thereon to connect with railways "in order to facilitate interstate commerce."[17] The company was further empowered to enter and condemn property according as such rights were enjoyed by railway and bridge companies in New York and New Jersey. Other provisions were that the transportation of mails over the bridge should be free, the interstate commerce commission was to regulate tolls on the basis of the actual cost of the structure, and any litigation was to be taken to a United States circuit court.

In the case of Luxton vs. North River Bridge Company, decided in 1894, the validity of the act was upheld by the courts, the decision declaring that Congress under the commerce clause

[16] Stockton v. Balt. and N. Y. R. R. Co., et al., 32 *Fed. Rep.*, 9 (1887).
[17] *Statutes at Large*, **26**: 268.

may create corporations to build bridges across navigable waters between two states, and take private lands therefor, making due compensation.[18]

Summary

The conclusions to be drawn from the history of federal regulation of bridges for railways are clear. Congress, in the interest of water transportation, regulated bridge construction, both locating and prescribing its manner. Regulation was called for to prevent the obstruction of interstate commerce by unreasonable and discriminatory practices. And acts authorizing bridges contained provisions concerning reasonable rates over the same, the basis for such regulation by the interstate commerce commission being provided in a late statute. A railway company's bridges are part and parcel of its line, and this interference was a regulation of railways,—doubly so, in that railway companies were both the builders and the users of the bridges.

Under its power to regulate interstate commerce by land Congress has authorized the construction of bridges over navigable waters within states, empowering them to take by eminent domain the land needed for piers; and in at least one case a national charter of incorporation has been granted. The fact that Congress in establishing the Pacific railways empowered them to construct bridges might also have been mentioned.

As to the place of these measures in the general history of interstate commerce regulation it should be remembered that only toward the close of the period does there seem to have been any clear recognition by Congress of the connection between them and the regulation of commerce by land. No question of interstate versus intrastate commerce seems to have been raised and but little debate over the commerce clause is found in this connection. The courts are clear on the subject, however. In the frequent acts declaring bridges post-routes the operation of the post office and post-roads clause is seen, and the importance of bridges in this connection contributed to their

[18] 153 *U. S.*, 525.

regulation. But, judging from congressional debates and legislation, this regulation seems to have been based on a broad interpretation of neither of these constitutional provisions, but to have rested on the preservation of the commerce of waterways and the better promotion of the public trade and welfare in general. Some of the acts in a sort of preamble state the ground for their passage to be "a more perfect connection of any railroads that are or shall be constructed to the said river."

CHAPTER XIX

CONGRESS AND THE GRANGER MOVEMENT

The Granger Movement

During the eight years succeeding the war, industrial development in general and railway construction in particular were very rapid. Just how similar conditions would have been had the war not occurred is, perhaps, impossible to say; but certainly one of the most important factors was the inflation of the currency which resulted from war financiering,—like an over-supply of oxygen it lent an unnatural vivacity. Farmers borrowed money to buy lands, towns and counties issued bonds to aid railways, and railways did likewise to construct the desired lines. Both farmers and railways pushed forward too rapidly. Especially in the upper Mississippi valley were railway subsidies carried to a reckless extreme, it being estimated that between 1865 and 1871 some $500,000,000 were sunk in western railways. Finally, as must be after an over-supply of that oxygen of trade, credit, the reaction came in the panic of 1873.

The farmers—and the railways, ultimately—depended upon the profitable marketing of their wheat and corn crops, and during the war and for some time after its close the prices of agricultural products were high. But with currency contraction and increased production came lower prices, while rates did not fall in proportion and were fluctuating. Then the farmers came to realize bitterly their dependence upon eastern markets for the sale of their grain, upon eastern railways for transportation, and upon eastern capitalists for their lands; and the complaints against absenteeism and monopoly became violent. So vital and commanding was the transportation factor that it was given most prominence, and, indeed, the railway methods

which prevailed at the time were such as to warrant attack. Corruption of political units; wastefulness and mismanagement through "rings," construction companies, fast freight lines, etc.; fluctuations and discriminations in rates, due to fierce rate wars—all these things and more were rife. These rate wars, affecting as they did, competitive points alone, tended to produce inequalities in rates, the tariffs from non-competitive local points remaining virtually unchanged in the face of falling grain prices.

The growing importance of the east-bound grain traffic has already been mentioned, and perhaps some illustrative statistics will make the significance of this matter more clear. In the first place the greatly increased production of cereals in four typical Granger states should be noticed:

PRODUCTION OF WHEAT AND CORN: 1850, 1860, 1870.[1]

(Bushels.)

	Year.	Illinois.	Wisconsin.	Iowa.	Minnesota.
Wheat.....	1850	9,414,575	4,286,131	1,530,581	1,401
	1860	23,837,023	15,657,458	8,449,403	2,186,993
	1870	30,128,405	25,606,344	29,435,692	18,866,073
Corn.....	1850	57,646,984	1,988,979	8,656,799	16,725
	1860	115,174,777	7,517,300	42,410,646	2,941,952
	1870	129,921,305	15,033,998	68,935,065	4,743,117

Now down to about 1856 virtually all the surplus grain of the western states went to market by way of the lakes and the Erie canal or down the Mississippi river; but by the year 1873 it was estimated that about 67 per cent. of that which was shipped east went by rail over the trunk lines.[2] More than this, nearly 50 per cent. of the entire east-bound traffic of the four main lines out of Chicago was made up of cereals, and nearly 45 per cent. consisted of animals and animal products.[3] The

[1] Report of Sen. Select Committee on Transp. Routes to the Seaboard, 1874. Appendix, p. 202.

[2] Rept. on Transp. Routes to the Seaboard, p. 24.

[3] *Ibid.*, p. 15. Bread stuffs made 90 per cent of the freight shipped east by lake.

following statistics indicate the movement of such shipments over a series of years:[4]

SHIPMENTS OF GRAIN EAST FROM CHICAGO BY RAIL, 1865–72.

Year.	Wheat.	Corn.
1865	895,028	902,309
1866	4,055,303	1,364,771
1867	1,899,277	1,285,428
1868	1,402,816	2,978,388
1869	1,895,823	4,501,181
1870	2,902,953	4,108,942
1871	688,576	2,515,154
1872	3,122,166	5,424,044

Further statistics might be presented to show that the proportion of the total shipment which went by rail was also increased.

Thus, the grain traffic of the railroads was great, and the rates upon that traffic were of increasingly vital importance to the West.

Illinois led off in the attack upon railway corporations. In revising her constitution in 1870 she incorporated a clause providing that the legislature should enact laws regulating railways, and in 1871 an act was passed which prescribed maximum railway rates and forbade discrimination. In the same year a railroad and warehouse commission was established, which, in 1873 was given power to make a schedule of reasonable maximum rates, the law of 1871 being repealed. The Granger movement proper, however, dates from the Farmers' Anti-monopoly Convention held at Des Moines, Ia., on August 13, 1873, when it was formally resolved to curb corporations and to agitate for a maximum rate law. Iowa passed such a law in 1874, and Wisconsin and Minnesota followed suit.

THE GRANGER AGITATION REACHES CONGRESS: 1869

So widespread and vitally important a subject could not but find expression in Congress, and during the Seventies hostility to railway corporations was necessary in successful political

[4] Taken from *ibid.*, append., pp. 29, 33.

candidates in the West. On December 20, 1869, Mr. Williams (Ind.) introduced a resolution touching the constitutional power of Congress to regulate for the protection of the agricultural interests of the Northwest the charges for freight and passengers upon railways;[5] this resolution, by reason of its place among the earliest expressions in Congress of those conditions which led to the Granger activity concerning railways, and the light it throws on the causes for that activity, is worthy of quotation: "Whereas"—the preamble runs—"it is the duty of the Congress of the United States to afford protection to all the industrial, manufacturing, and mechanical interests of the country equally; and whereas by the construction and consolidation of extensive lines of railway, extending from the seaboard to the agricultural States of the West, and extending through two or more States; and whereas such railway companies by their consolidation have become such giant monopolies as to control the entire lines of transportation from the producing States of the West to the Eastern markets; and whereas by the regulation of freight traffics on their lines of railways they have adopted such exorbitant, oppressive and unequal rates for the transportation of the agricultural and other productions of the West as to consume in charges for transit more than one-third of their entire value, while the manufacturing interests of the East are protected by a tariff . . . , thereby discriminating against the agricultural and other productions of the West, compelled to seek a market at the seaboard; and whereas by the eighth section of the Constitution of the United States it is provided . . . that Congress shall have the power to regulate commerce with foreign nations and among the several States; and whereas doubts may exist whether under the Constitution Congress has the power to regulate and limit the rates of freight on lines of railways passing and extending through two or more States; Therefore, Resolved, That the Judiciary Committee be instructed to inquire into the constitutional power of Congress to legislate, or to enact such laws as shall protect the great agricultural and other producing in-

[5] *Cong. Globe*, 1869-70, pp. 239, 868.

terests of the West, by limiting the rates of tariff on such productions from the West to the sea-board . . ."

In a word, this resolution, charging the trunk lines with consolidation and monopoly leading to exorbitant and unequal rates on agricultural produce bound for the sea-board, asks that doubt be cleared up as to the power of Congress to regulate rates under the commerce clause. It is full of sectionalism and complains that the protective tariff discriminates against the West as compared with the East.

Debate on Extortionate Rates in the East-Bound Grain Traffic

At this same session, a debate concerning government control of railways occurred in the House, which was deeply tinged with the newly arisen western activity against railways.[6] Mr. Williams (Ind.) began by stating that his plea was for the unrepresented laboring agriculturists of the West and that he spoke in anticipation of a great battle which, ere long, would be fought between labor and combined monopolies. Within the last five years the four great railways from New York and Philadelphia west had combined, and then absolutely controlled the carrying trade for six months of the year. These "railway kings," these "blood-sucking vampires," whose motto was "submission to our extortionate charges, or your wheat, oats, and corn may rot in your granaries without a market,"—should this "licensed larceny" be longer tolerated on the plea that eminent domain lay in the states and that Congress had no power over rates under the constitution?

He believed that Congress could regulate railway rates, railways being clearly the avenues for the interchange of commodities and persons among states which constitutes the "commerce" of the constitution. This power, too, gave to Congress the right to charter and incorporate the channels through which interstate commerce should pass. As a last resort he was in favor of chartering a great national freight highway and if necessary to give it aid, believing that the enormous charges imposed by

[6] *Ibid.*, p. 868 ff.

the railway monopolies on western commerce during the three years passed would amount to enough to construct and equip a double-track freight railway from New York to St. Louis.

Finally, the nationalistic tone of the speech should be noted. In arguing against the proposition that the states alone have eminent domain and that Congress has no power to charter corporations he declares that Congress would be cringing like a whipped spaniel at the feet of the states and thirty-eight millions of people must bow submission at the feet of railway monopolies.

Mr. Wilkinson (Minn.) followed with a reference to the existing depressed condition of agriculture in the West, and assigned as the cause the "extortions of a few soulless railway corporations." The wheat crop for 1869 was being sold by the producers at the various railway stations for about 50 cents a bushel; at the same time the New York price equalled from $1.20 to $1.25 per bushel; hence, from 70 to 75 cents a bushel was being collected by the railways.[7] Minnesota had a surplus of some 16,000,000 bushels. In New York this would bring $20,000,000; but the patient toilers of Minnesota would get but $8,000,000. Railway rates were at least one-third too high. The people were being plundered by chartered monopolies—monopolies which they had aided by land grants or otherwise.

The position of Mr. Wilkinson, and men of that ilk, on the regulation question is summed up in the words of Judge Miller in the case of Gray vs. The Clinton Bridge Company, quoted by him: "For myself I must say that I have no doubt of the right of Congress to prescribe all proper and needful regulations for the conduct of this immense traffic over any railroad which has voluntarily become part of one of those lines of interstate communication, or to authorize the creation of such roads when the purposes of interstate transportation of persons and property justify or require it."

He, too, was highly nationalistic. The state legislatures had proved unable to deal with the problem and were largely dominated by the power of organized wealth; therefore congressional

[7] An even worse condition is pictured in 1874 on the basis of Grange statistics: see *Cong. Globe*, 1873-74, Appendix, p. 161.

legislation was demanded. To argue that what New York's railways did was New York's business, he stated to be fallacious, because others were interested. Not a bushel of wheat from the West passed that way but was taxed to fatten the monopoly.

But enough has been given to indicate the attitude and arguments of those who represented the interests that were about to enter the "Granger Movement." No strong speech was made in reply,—no immediate action being involved,—merely Mr. Eldridge (Wis.) and Mr. Fitch (Nev.) were inclined to doubt the power of Congress to interfere with corporations chartered by states. Throughout the remainder of the period these interests played an important part in bringing to pass an interstate commerce law, and variations of their arguments are found in many a long speech to which it will be found unnecessary to refer.

Railways vs. Waterways

It is natural that, since there was so much dissatisfaction with railway rates, men should turn to waterways for relief. At that time canal and river competition was far more effective than at present and abundant statistics were presented to show that transportation by water was always cheaper than by land. The report of the secretary of war in 1871 contained such statistics.[1] Average charges for ten years from Chicago to New York had been $7.665 per ton by water lines; by the Central railway, $14.31 per ton. From St. Louis flour had been carried to New York by rail for $13.00 per ton; to New Orleans by river for $11.50. Average receipts on the New York freight canals during 1865, 1866, and 1867 were 1 cent per ton per mile; on the New York Central, 2.92 cents; on the Erie, 2.42 cents. The conclusion drawn was that the great cost of constructing and operating railroads was such that they could not compete with water carriers for heavy freight. The reason for their increasing percentage of the traffic lay in their organization and the way in which they solicited freight. The tendency of railways was to consolidate; there could be no real competition among

[1] 2: 630, 644, etc.

them; lakes, rivers, and canals were the only protection against their monopoly.

Quite similar was the memorial and report of a Detroit Commercial Convention.[9] It was stated that corn in Iowa was only bringing the farmer 18 cents a bushel, while in New York the price was averaging over 80 cents. At the same time that the price of wheat was falling the railway magnates were raising rates. Something must be done to stop this extortion and the only remedy seemed to be a rival system. This must be water, for railways could never give to the country cheap transportation.[10] It seems to have been believed by some that railways should be considered as mere feeders to waterways.[11]

Probably in every respect the most important document bearing on this subject was the "Windom Report" made by a Senate committee in 1874.[12] This is a long report, accompanied by an appendix nearly as long, which takes up all aspects of the problem of cheap transportation for the products of Western agriculture, constitutional, economic, and technical. In summing up, the committee drew the conclusion that all the evidence showed that water routes when properly located furnished the best and cheapest transporation for heavy, bulky, and cheap commodities, and that they were "the natural competitors and most effective regulators of railway transportation."[13] It advised the improvement of our great natural waterways and their connection by canal or portage railways under government control as the obvious and certain solution of the problem of *cheap* transportation.

Some of the statistics and reasoning upon which the conclusions of the committee were based are of interest as indicating the conditions of transportation which influenced the Grangers. The following table, showing as it does that all-rail rates east for 1872 were 24.5 per cent higher than all-water rates, was held important.

[9] *H. Misc.*, 1872-73, no. 22.

[10] See speech of Mr. Negley (Pa.), *Cong. Globe*, 1872-73, append. p. 56 for further material of this general character.

[11] *Cong. Rec.*, 1873-74, p. 2427.

[12] Rep. of Sen. Select Committee on Transp. Routes to the Seaboard, 1873-74.

[13] *Ibid.*, p. 242-3.

AVERAGE MONTHLY FREIGHT CHARGES PER BUSHEL ON WHEAT FROM CHICAGO TO NEW YORK.

By water (lakes, Erie Canal, and Hudson River), by lake and rail (lake to Buffalo, and thence rail to New York), and by all rail, 1868 to 1872, inclusive.[14]

Month.	Year														
	1868.			1869.			1870.			1871.			1872.		
	All water.	Lake and rail.	All rail.	All water.	Lake and rail.	All rail.	All water.	Lake and rail.	All rail.	All water.	Lake and rail.	All rail.	All water.	Lake and rail.	All rail.
	Cts.	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*
January			51			42			42			39			39
February			51			39		...	42			39			39
March			48			30			36			30			36
April		28	42		26	30		22	30		22	27			30
May	20	26	36	19	25	30	16	20	27	16	21	27	18	25	27
June	19	25	30	21	25	27	16	21	27	16	21	24	21	23	27
July	18	25	33	18	23	27	15	20	27	16	22	27	23	23	27
August	22	26	36	19	20	30	15	20	27	18	24	30	22	23	27
September	25	33	39	22	22	39	15	23	30	23	28	33	27	32	33
October	27	34	42	29	27	39	21	25	36	27	32	39	31	37	39
November	28	35	45	32	36	42	20	29	39	25	32	39	28	38	39
December			45			42			39			39			39
Average	25.3		42.6	24.1		35.1	17.5		33.3	21.6	22.3	31.0	26.6	28.8	33.5

Though statistics showed that the percentage of grain shipped from Chicago and Milwaukee by rail had increased, yet the fact that 90 per cent of the wheat still went by lake in spite of the organization of through freight lines, cost of handling at terminals, etc., showed the superiority of water transport.

As to canals, the average rate on the Erie canal for the five years from 1868 to 1872, inclusive, was only 51 per cent of the cost of movement on the railways and it was believed that by enlarging the canal and using steam power, rates could be much lowered.

[14] *Ibid.*, p. 52.

COST OF TRANSPORTATION PER TON PER MILE ON THE ERIE CANAL, ON THE ERIE RAILWAY, AND ON THE NEW YORK CENTRAL AND HUDSON RIVER RAILWAY FROM 1865 TO 1872, INCLUSIVE. [15]

Year.	Rate per ton per mile on the—					
	New York Central and Hudson River Railway.		Erie Railway.		State Canals.	
	Cents.	Mills.	Cents.	Mills.	Cents.	Mills.
1865	3	3	2	7	1	1
1866	2	9	2	4	1	0
1867	2	5	2	0	0	9
1868	2	6	1	9	0	9
1869	2	2	1	6	0	9
1870	1	9	1	4	0	8
1871	1	6	1	5	1	0
1872	1	7	1	5	1	0

N. B.—The cost by canal in this table includes both freight and tolls.

Even the Ohio canals, unsatisfactory and defective as they were, effected a considerable reduction in railway rates between Cincinnati and Toledo.

DOUBLE-TRACK FREIGHT RAILWAY TO THE SEA-BOARD PROPOSED.

Though the Windom report advocated government improvement of waterways in the interest of cheap transportation, it also treated at considerable length the project for a government railway; and such prominence did this scheme attain that no account of the activities directed toward securing from Congress better facilities for the east-bound grain and live-stock traffic would be complete without noticing it. There were many plans proposed, the essential feature of which was a double-track railway from the coast to the Mississippi valley, to be constructed in the most substantial manner and to be owned or controlled by Congress. Rates would be as low as was consistent with a reasonable return upon the capital actually invested. The report explained that this plan was based on the theory that because of stock inflation, extravagance and dishonesty in construction and management, and combinations among the railways, rates

[15] *Ibid.*, p. 61.

were exorbitantly high.[16] An honestly managed government line would check combination and regulate others so as to secure transportation at reasonable rates. "The intelligence, numbers, and respectability of the advocates of this system of regulation," says the report, "entitle it to the most careful consideration."

Indeed, about a year previously to the report, the Senate agreed to a resolution that this committee on transportation routes be instructed to inquire into the propriety of providing for the construction of a first-class, double-track railway from the Atlantic sea-board to some point on the Mississippi or the Missouri river, with the consent of the states through which it should run, the road to be operated under the direction and subject to the control of the United States.[17]

After examining evidence concerning transportation both in this country and abroad, the committee came to the conclusion that upon an exclusively freight-carrying railway, economically constructed and managed, a rate of 6 mills per ton per mile on fourth class commodities, such as western cereals, might be maintained; and the successful operation of such a line would compel existing lines to adopt substantially the same system and the same rates. In its summary of conclusions and recommendations, however, the committee did not advise the construction of such a road; but confined itself to stating that "the only means of securing and maintaining reliable and effective competition between railways is through national or state ownership, or control, of one or more lines, which, being unable to enter into combinations, will serve as regulators of other lines."[18]

It was in the House that this scheme was most actively agitated. As early as 1873 a joint resolution (no. 212) for directing the secretary of war to survey and estimate the cost of a double-track railway from Omaha to New York, with branches to Chicago and St. Louis, was referred.[19] Then in January, 1874, there was a petition from 1140 citizens in favor of such

[16] *Ibid.*, p. 141.
[17] *Cong. Globe*, 1872–73, p. 1775. Feb. 26, 1873.
[18] Rep. of Sen. Select Committee on Transp. Routes to the Seaboard, p. 242.
[19] *H. Jr.*, 1873–74, p. 121.

a railway from Chicago to New York;[20] which petition recited the increase in population, in demand for transportation facilities, and in rates; stated that warehouses in Chicago were so completely filled as to partially suspend business; and asked that, if Congress could not build a road, it would charter a company for that purpose and establish rates of toll. At about the same time Mr. Hurlbut (Ill.) introduced a bill (*H. R.* 1194) for chartering a double-track freight railway from tidewater on the Atlantic to the Missouri river and to limit rates of freight thereon.[21] This bill was the most prominent of the measures of this kind. It was referred to the committee on railroads and canals, reported and re-committed,—other bills of like character being brought before the committee. In their report the committee stated that while some relief might come from rate regulation this would be a mere palliative. No really cheap transportation could be obtained on existing railways; for they were built for local purposes and did not have the best gradients possible. Above all the combination of freight and passenger service on the same line made the cheapest rates possible. On the trunk lines six different classes of trains were run, each interfering with all the rest.

The Continental Railway Company.

Mr. Hurlbut's bill seems to have been presented in behalf of a corporation known as the Continental Railway Company. This company had furnished evidence of corporate rights under the laws of New Jersey, Pennsylvania, Ohio, Indiana, Illinois, and Iowa, covering the line of road which it was proposed to build; and had expressed willingness to submit to congressional rate regulation, a maximum rate on bulky products amounting to less than half the existing rate to be fixed. In return, the company asked Congress to make the enterprise a national one to the extent of guaranteeing 5 per cent interest on $20,000 per mile of single track, offering to give as security a prior lien on their realty.

[20] *H. Misc.*, 1873-74, no. 70.
[21] *H. Jr.*, 1873-74, p. 219.

This Continental company was composed of several railway corporations deriving their charters from the states through which they ran and duly consolidated to form a continuous through line from the eastern border of Pennsylvania to Council Bluffs as early as 1872.[22] In 1873 it purchased and consolidated with the New Jersey Tube Transportation Company and that consolidation was duly authorized by New Jersey. A branch was projected from Rensselaer, Ind., to Chicago. In 1874 the company stated that it had made an examination for a railway between New York Bay and Council Bluffs with the result that only 96 miles would be consumed in curvature and the distance be reduced to 1224 miles, 123 miles less than the Pennsylvania's shortest route. Subsequent survey had proved that the maximum grade would not exceed 30 feet to the mile going east, nor 40 feet going west. It had surveyed and located 450 miles, had graded and bridged 100 miles, and had secured right of way for 900 miles. When completed, 33-ton locomotives would haul trains of forty 10-ton cars at a speed of ten miles an hour over rails weighing 68 pounds per yard, the rate to be 6 mills in summer and 7 mills in winter, with a reduction whenever net earnings exceeded 8 per cent on the capital stock.

Though merely recommitted at the 1873–74 session, Mr. Hurlbut's bill (*H. R.* 1194) was again reported at the following session.[23] Here, however, its course was finished and Congress never aided the Continental Railway Company.

Further Agitation for Freight Railways

That the advocacy of a scheme for a government freight railway, backed as it was by so numerous and respectable a following, did not cease to be agitated, is evidenced by other bills. In 1876 Mr. Hurlbut (Ill.) introduced another bill[24] (*H. R.* 1490) which, upon being referred to the committee on railroads and canals was reported with a substitute (*H. R.* 2929). Mr.

[22] Rep. of Sen. Select Committee on Transp. Routes to the Seaboard, 1874. Appen., pp. 159, 154.
[23] *H. Jr.*, 1874–75, p. 84.
[24] *Cong. Rec.*, 1875–76, p. 590; H. Rep. no. 360.

Jones (Ky.) was its sponsor.[25] The substitute bill provided for seven commissioners to be appointed one each by the governors of the states of New York, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, and Iowa; they were to form a corporation under the name and style of the United States Railway Corporation. The corporation was to finance and construct a double-track railway from New York to Council Bluffs with branches to St. Louis and Chicago. The road was to be of 60-pound steel rails and have the lowest grades, and easiest curves possible. The estimated rate would be 2½ mills per ton mile. The cost was estimated at $35,000,000, and the large number of petitioners from many states insured, the committee thought, the ready sale of the corporation's securities. This committee, it is interesting to note, reports that experience with the Erie Canal, showing as it did a relative decline in traffic, proved that canals can not compete successfully with railways under the modern improvements in railway freight transportation.[26]

At the special session in 1877, at least three different bills were introduced, none of which were passed. One of them (*H. R.* 1506) introduced by Mr. Sleicher (Tex.), was taken up in 1878 at the following session.[27] A report of the committee on railways and canals favoring the bill shows it to have been similar to the Jones substitute in 1876. In 1878, too, a bill (*H. R.* 2599) organizing the National Railway Company of the United States of America for the purpose of constructing a double-track freight railway from the Atlantic sea-board to Chicago, St. Louis, and Council Bluffs, and to regulate it in the interests of commerce among the states, was introduced.[28] With the growth of commerce and the settlement of the West even larger projects were put forth and at the 1883–84 session a bill for a double-track railway from New York to San Francisco was introduced.[29]

[25] *Cong. Rec.*, 1875-76, pp. 2007, 2270.
[26] *H. Rep.*, 1875-76, no. 360.
[27] *H. Rep.*, 1877-78, no. 379.
[28] *H. Jr.*, 1877-78, p. 244.
[29] *Ibid.*, 1883-84, p. 1172.

PROPOSED FORTY-FIRST PARALLEL RAILWAY—NARROW GAUGE FAD

Of similar significance to the agitation for a double-track freight railway were bills introduced in 1874 and 1875 for chartering the so-called Forty-first Parallel Railway Company of the United States of America. In the House Mr. McCrary (Ia.) introduced the bill and it was referred to the committee on railways and canals, of which he was a member.[30] When reported, it was merely recommitted. In the Senate the bill was first referred to the select committee on transportation routes to the sea-board, then to the committee on railroads, which committee reported against its passage.[31]

The general nature of the bill was as follows. It provided for the construction of a railway of three-foot gauge extending from Toledo, O., along or near the forty-first parallel to Council Bluffs, with an extension to New York.[32] The government was to have free mail and telegraph service; passenger rates were to be 2 cents per mile for distances over one hundred miles; and a maximum freight rate for distances of from 500 to 600 miles was to be fixed at 6 mills per ton-mile, the rate increasing as the length of shipment decreased. On *west-bound* freight 30 per cent. might be added.

The company asked an appropriation of $10,000 per mile.

At this time the fad for constructing narrow-gauge roads was just beginning in the United States—a fad which culminated in the construction of at least 5,267 miles of narrow-gauge railway in the year 1880.[33] It is evidence of the significance of a congressional history that this fad found early expression in Congress. It was largely due to the demand for cheap transportation and especially transportation to the sea-board. At this time the crisis of 1873 had not been recovered from and it was difficult to find means for constructing railways; hence the narrow-gauge was advocated because of its lower cost both in construction and operation.

[30] *H. Jr.*, 1874-75, p. 72.
[31] *Sen. Jr.*, 1874-75, pp. 94, 181, 219.
[32] *H. Rep.*, 1874-75, no. 156.
[33] Ringwalt, *Trans. Syats. in the U S.*, p. 223.

The House committee, though it reported against aiding the Forty-first Parallel scheme, stated its belief to be that narrow-gauge roads were destined to become the important, if not the controlling, element in the solution of the problem of transportation, *i. e.*, cheap transportation. The cost of existing roads was too great and their profits were exorbitant. The average cost of standard gauge railways was $42,000 and $50,000 per mile, for iron and steel respectively; narrow gauge would cost but 50 to 60 per cent of this. The operating ratio on the best roads of standard gauge was 64 per cent; the Denver and Rio Grande, a narrow-gauge road, was operated with an expenditure amounting to only 50 per cent of its gross earnings.[34] The committee stated its belief that the several states had done all in their power to place the carrying trade in the hands of a few corporations.

Another narrow gauge project which came before Congress at about this time was the Washington, Cincinnati, and St. Louis Railroad Company, bills for aiding this company to construct a road from tidewater to St. Louis and Chicago being introduced.[35]

The House Passes Granger Regulation: 1874

Thus far only that Granger activity which sought a remedy for transportation ills in government competition has been touched upon; but, though cheap transportation gained through government waterways and freight railways was the dominant ideal, restrictive regulation similar to that being passed at the time by Granger state legislatures was also advocated by many. In 1874 the House passed the so-called McCrary Bill by a vote of 121 to 116[36]—one of the most notable attempts to regulate railway rates prior to the Interstate Commerce Act. The bill forbade unreasonable charges and provided for a board of railway commissioners with power to make a schedule of reasonable maximum rates.[37]

[34] For further discussion of narrow-gauge see *H. Rep.*, 1875-76, no. 346.
[35] *H. Jr.*, 1874-75, p. 60; *Sen. Jr.*, 1874-75, p. 49.
[36] *Cong. Rec.*, 1873-74, p. 2493.
[37] *Ibid.*, p. 1945; see also below, p. 283.

Alleged Combination of Trunk Lines Attacked: 1876

There remains one episode further in the congressional history of railways which should be brought into connection with the Granger movement, not only from its nature, but also from its outcome. On March 20, 1876, Mr. Hopkins (Pa.) introduced a bill to regulate commerce and to prohibit unjust discriminations by common carriers. It was referred to the committee on commerce, and no further record of it is to be found. The writer has not found the words of this bill, but it seems probable that it was directed against conditions set forth in a resolution presented at the same session by the same man.[38] "Whereas it is alleged that certain of the leading railroads engaged in interstate commerce, and in commerce from the inland States to the sea-board for exportation have combined for the purpose of controlling said traffic,[39] and have made and continue to make unjust discriminations . . . ; and whereas numerous petitions have been presented during the present session of Congress praying for the passage of an act to regulate such commerce and to prohibit such discrimination . . . Resolved, that the Committee on Commerce investigate the allegations aforesaid." Thus the subject concerned was partly, at least, the east-bound grain traffic and the Granger situation.

But notice what became of the investigation. Eight years later, in debating the regulation of interstate commerce Mr. Hopkins said: "In the first session of the Fourty-fourth Congress I introduced a bill to regulate interstate commerce . . . And soon thereafter I secured the passage of a resolution instructing the Committee on Commerce to investigate the charges of favoritism and combination by railroad companies. That investigation proceeded far enough to prove specific acts of gross discrimination. But by some process, never yet explained, the investigation was smothered at a critical juncture, and the testimony already taken disappeared from the commit-

[38] *H. Jr.*, 1875-76, p. 999.

[39] In Dec., 1875, and Mch., 1876, temporary agreements were reached between competing trunk lines; but for the most part this was a period of cut-throat competition. Doubtless there were constant rumors of combination. See Adams, *Railroads, Their Origin and Problems.*

tee room."[40] This assertion was not denied, nor did it excite much comment. We are left to draw the inference that the fate of the investigation was not extraordinary and—though it is to be hoped that there are modifying factors unknown to us—it seems a sad commentary on the legislative tactics of the railways.

Discussion and Summary

The social and economic reasons which brought on the Granger Movement found most ready and marked expression in state legislatures and courts; but, as was resolved in a northwestern platform of 1873, the Grangers would not aid in elevating a man to *any* public position unless he was ready to annul chartered privileges or vested rights used to the detriment of the public welfare,[41] and it was a part of their plan to work through Congress.

The one great end of the movement at its outset was *cheap* transportation. Three chief means of securing that end were brought forward: (1) improvement and construction of inland waterways, (2) construction of national freight railways, either standard-gauge, double-track or narrow-gauge, (3) regulation of existing lines.[42] The last mentioned means was not direct enough to suit the spirit of the Granger and was regarded as a sort of palliative. Discrimination was not infrequently complained of but did not become the great issue till later in the Seventies.

Competition was the force relied upon to secure the desired result. The government railways and waterways proposed were to compete with existing lines and break monopoly; regulation was to do away with monopoly. But the large element which the reduction of rates through improved construction and financial methods formed in the congressional discussion—a thoroughly justifiable and enlightened agitation—seems to have been much

[40] *Cong. Rec.*, 1884-85. p. 63.

[41] Ringwalt, *Trans. Systs. in the U. S.*, p. 230.

[42] For typical Granger speeches favoring regulation see remarks of Kasson (Ia.), *Cong. Globe*, 1873-74, Append., p. 163; and by Loughbridge (Ia.). *Ibid.*, p. 6.

overlooked. Many of those who recommended competition believed that the force must be controlled by a power with which combination would be impossible and must operate through more cheap and efficient channels than the existing ones.[43] And there were a few who saw that effective railway competition was impossible.[44]

The movement came just at the time when water and land were competing on fairly equal terms. The growing use of steel rails, and other improvements in technics and organization had steadily reduced railway rates for a number of years prior to 1872, and the railway was taking a larger proportion of the traffic; but lakes, rivers, and canals still carried a large part and did it at a lower cost. Thus, when, in 1872, the steady reduction was checked and freight rates were quite generally advanced while prices for wheat and corn were low it was natural to turn to waterways.

As the Granger movement came before the power of Congress to regulate railways—"the private railway corporations of the states," as they were sometimes called—was generally conceded, it was natural, too, that relief should be sought through congressional incorporation. It was common for men who held that Congress could not regulate the rates of railways to agitate the creation of National corporations for constructing railways or waterways— corporations under direct control of the government.[45] Yet this proposition is the more radical. It came into great prominence during the Granger agitation.

In connection with the east-bound grain traffic it should be remembered that a considerable part was for export. Questions of differentials, ocean freight rates, etc., were involved, then as now.

The place of the Granger movement in the growth of railway regulation is fairly well understood. It brought about a truer relation of the railway to the public; it taught railway officials that they were administering public highways; it taught the

[43] Rep. of Sen. Select Committee on Trans. Routes to the Seaboard, p. 242.
[44] E. *g.*, Loughbridge (Ia.), *Cong. Rec.*, 1873–74, Append., p. 6.
[45] See *e. g.*, *Cong. Rec.*, 1873–74, pp. 772, 775. (Senators Oglesby (Ill.) and Clayton).

public that railway property was entitled to reasonable profits. In connection with this idea, however, should be placed the recognition of the force of this movement in opening the way for national regulation. The West has never been imbued with the states' rights idea as have the East and South and has always tended to take a nationalistic attitude toward political problems. The question of railway legislation was deeply involved with this political question and the attitude of the people of the West was important. They readily stood for federal power and federal railway regulation. State boundaries did not mean so much to them: *the transportation in which they were vitally interested passed through many states to its eastern and southern destinations*—was interstate; they had not the political predilections of the older states; but, above all, their economic interests made federal interference imperative.[46]

[46] For strong statement of this attitude of the West see speech by Mr. Hazelton (Wis.) in Cong. Rec., 1873-74, p. 2147, circa. It is illustrative of the opportunist character of the economic politics of modern times that in not a few instances the Grangers assumed the garb of States' rights. This was when they hoped to secure results from State regulation and feared Congressional interference.—See above in Chap. II.

CHAPTER XX

REGULATION OF LIVESTOCK TRAFFIC; FIRST POSITIVE REGULATION OF INTERSTATE COMMERCE

Hardly second to state obstructions as an effective cause of early railway regulation was the cruel and disease-breeding treatment of animals shipped over railways. By the time of the early Seventies the livestock traffic from the western and especially the southwestern states had become important, and when, to man's common disregard for the comfort of his dumb animals, the pressure of violent rate wars was added at about this time,[1] the condition of livestock shipments became deplorable and sickening. As early as 1870 there was introduced in the House by Mr. Wilson (O.) a bill to prevent cruelty to animals in transit by railway. The bill was referred to the committee on agriculture.

The First Bill for Regulating Livestock Traffic

The report of the committee favored a measure in the nature of a substitute. It provided that no railway company whose road formed any part of a line over which cattle, sheep, swine, or other animals would be conveyed from one state to another,—nor the owners or masters of vessels transporting interstate shipments of this kind,—should confine them in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours without unloading them for at least five consecutive hours for rest, water, and feeding, unless prevented by storm or other accidental cause. The penalty for violation was a fine for each offense.

[1] The report on the Internal Commerce of the U. S. for 1879, p. 177, mentions that at one time cattle were shipped from Chicago to Pittsburg free, and, in some instances, to the coast for $5.00 a car. This was far below cost, the rate on Dec. 1, 1879, being $110 per car.

Debate on Congressional Interference with Livestock Traffic

Mr. Eldridge (Wis.) at once opened for the opposition.[2] He thought the bill proposed to interfere with the constitution, with the corporations established by the various states, and with the states themselves in a way unjustifiable and unwarrantable. And Mr. Swann (Md.) referred to it as a crying injustice to agricultural communities in that it deprived shippers and railway companies of power to control these matters by agreement among themselves. He also thought that it was more humane to ship cattle through rapidly than to stop and unload them at intervals; and Mr. Archer (Md.) deemed the measure impracticable.

In reply, Mr. Wilson (O.) stated that the bill had been very carefully matured and had been submitted to some of the most able legal gentlemen of the House, who had fully acquiesced in its constitutionality. Various states, among them Maine, Massachusetts, New York, and Illinois had passed laws on the subject; but, for want of jurisdiction, the laws had been of limited use and applied only within the states. The bulk of the traffic was over interstate or through lines, as, for instance, from Kansas to New York; hence the necessity for a federal law. The traffic was conducted in an inhuman and barbarous manner, and was not only reprehensible on that account, but also made the meat deleterious and spread disease.

Mr. Cook (Ill.) thought the regulation proposed in the bill similar to that which had been exercised by Congress from the beginning over the transportation of animals and freight in steamboats and other vessels upon navigable streams. Here laws had been passed to guard against accident and prevent inhumanity.

Mr. Scofield (Pa.) also thought the bill entirely constitutional and spoke at some length on the exploded idea of states' rights.

When the bill came to a vote it passed by a majority of 66—123 in favor; 57 opposed.[3]

[2] *Cong. Globe*, 1870-71, p. 432.
[3] P. 555. Not voting, 57.

The Senate does not Act on the House Bill

In the Senate most of the speaking was done in opposition.[4] Mr. Hamilton (Md.) said that while the object of the bill was philanthropic (!)—he was probably not a Greek scholar—he believed that the matter could best be left to the control of the interests concerned, the cattle raisers and the carriers. The powers asserted in the bill for the federal government were too comprehensive to suit him. Mr. Tipton (Neb.) held that Congress should take very little jurisdiction in this matter; that in such questions whatever could be done by state legislation should be left to the states.

Mr. Cameron (Pa.) supported the bill; but it was postponed and nothing further was done at this session.

At the following session the matter was kept alive by the introduction in the Senate of a bill to prevent cruelty to animals in transit on railroads.[5] It was referred to the committee on agriculture and got no further.

The Bill to Prevent Cruelty to Animals in Transit Passed

Finally, in 1872, the bill which, with slight change, was to become a law was reported in the House by Mr. Wilson (O.).[6] Like its predecessors it provided for a twenty-eight-hour maximum for consecutive shipment, with a fine for each violation. The bill passed the House with little resistance, though Mr. Kerr (Ind.) stated his doubts as to its constitutionality and his belief that such legislation tended toward paternalism, multiplication of courts, officials, expenses, etc.

Meanwhile the Senate had referred a bill (S. no 419) on the same subject to its committee on the judiciary, and, that committee reporting adversely upon it, the bill was indefinitely postponed and the House bill taken up. The Senate committee

[4] *Ibid.*, p. 1768.

[5] *Cong. Globe*, 1871, p. 86. Sen. bill no. 36, introduced by Mr. Conkling (N. Y.).

[6] *Ibid.*, 1871-72, p. 2366, H. bill no. 694.

on agriculture, to which it had been referred, reported this bill without amendment, and the debate began.[7]

One of the most prominent in the discussion was Senator Casserly (Cal.) and an amendment proposed by him sums up his ideas. It was to the effect that the act should not go into operation for one year after passage, and that it should not apply in states having adequate laws. The former idea was held by several others and was based partly upon the loss to railways from so sudden a change, but chiefly upon the hope that the states might take the matter up and pass adequate laws. And Mr. Casserly said Congress had no business in regulating for the health of the people. This was a function of the states and belonged to their police power. The more the subject was left to state jurisdiction the better it would be administered. He also thought twenty-eight hours not long enough. Mr. Thurman's (O.) position was not dissimilar. He was not clear as to its constitutionality, though tending to believe it constitutional, and favored state action. The state courts being more numerous would secure a stricter enforcement of such a regulation than the federal. He moved to postpone the bill till the following session, but lost.

Among the supporters of the bill Mr. Frelinghuysen (N. J.) seems to have been as outspoken as any. He argued that the measure was constitutional under the commerce clause as construed by the supreme court to include all the means by which commerce can be carried on, whether by free navigation of the waters of the several states or by passage through the states where such passage becomes necessary. He pointed out that an amendment making the law of no effect in states already having legislation would render the regulation futile, for the trouble and the offense came through a number of states, on interstate shipments. And, with others, he gave the danger to the health of the community, the loss to cattle raisers through the "shrinkage" of cattle, and humanity as the reasons for the passage of the act. (Mr. Flanagan said there were other constitutions than that of the United States to be looked after, as, for instance, the constitutions of consumers.)

[7] *Ibid.*, pp. 2674, 4226.

The bill was passed, 26 yeas to 13 nays.[8] The unusually large number of the absent, 35, suggests that the senators were not over-anxious to place themselves on record in connection with this measure. The chief amendments were the insertion of the adverbs "knowingly and willfully", as qualifying the acts which made one liable to fine under the act; and the initiation of the bill was made to begin October 1, 1873.

The House concurred in the amendments,[9] and the bill became a law by the approval of President Grant on March 3, 1873.[10]

Regulation of Immigrant Traffic Proposed

In the course of the Senate debate, Mr. Casserly offered an amendment to the effect that immigrants travelling on railways

[8] *Ibid.*, p. 4872.

[9] *Ibid.*, 1872-73, pp. 681, 2094.

[10] *Statutes at Large*, **17**: 584. Be it enacted, etc., "That no railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State to another, . . . shall confine the same in cars . . . for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated. Animals so unloaded shall be properly fed and watered, be given rest by the owner or the person having the custody thereof, or in case of his default in so doing, then by the railroad company . . . ; and said company . . . shall in such cases have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals authorized by this act. Any company, owner, or custodian of such animals, who shall knowingly and wilfully fail to comply with the provisions of this act shall, for each and every such failure . . . be liable for a forfeit and pay a penalty of not less than one hundred and not more than five hundred dollars: *Provided, however,* That when animals shall be carried in cars, . . . in which they can and do have proper food, water, space, and opportunity for rest, the foregoing provision in regard to their unloading shall not apply.

S. 2. That the penalty created by the first section of this act shall be recovered by civil action in the name of the U. S., in the circuit or district court of the U. S. holden within the district where the violation of this act may have been committed, or the person resides or carries on its business; and it shall be the duty of all U. S. marshals, their deputies and subordinates, to present all violations of this act which shall come to their notice or knowledge.

S. 3. Liens arising under S. 1 enforceable in district court.

S. 4. Act to go into effect October 1, 1873.

forming any part of an interstate line should, in all cases where they had to travel for one or more nights, be provided by the railway over which they travelled with proper conveniences for sleeping and washing in the cars. All such immigrants were to be taken to their destination without unreasonable delay.

The occasion for this proposed amendment appears to have been a special message from the president concerning the mistreatment of immigrants—a class of people, it will be remembered, much more desirable then than now. Transmitted with the message was a report which showed that complaints had been made against the railway companies because they were running immigrant trains on slow time, taking from three to four days to cover the distance between New York and Chicago. The immigrant "must take his chances, live upon the hard benches upon springless cars for many days at his own expense, very often without fire or water, owing to neglect of employees, who care nothing for the comforts or necessities of foreigners." It certainly seems not inappropriate to place the regulation of such a traffic in a bill to prevent cruelty to animals.

Mr. Casserly argued that if the government could penalize delays in the mail service, it surely ought to give some legal remedy to the immigrant who was frequently treated less considerately than the brutes. Such an argument has force if the power of Congress over interstate commerce on railways is conceded; but, since the mail service was conducted under the post roads clause and the constitutionality of interfering with railways under the commerce clause was gravely doubted, it begged the question which lay in the minds of many. The amendment was lost by a vote of 15 to 23.

Further Bills Relating to Livestock Traffic

The act of 1873 did not end the demand for preventing cruelty to animals in transportation. Not to mention the difficulty of securing conviction, the act was found faulty in that twenty-eight hours was too long a period, the railway companies charged exhorbitant prices for food, and when unloaded the cattle were not put in proper pens nor cared for properly. In

1875, Mr. Woodworth (O.) introduced a bill to amend this act which was referred to the committee on agriculture.[11] Two years later a bill relating to the transportation of animals introduced by Senator Howe (Wis.) was referred to the committee on judiciary.[12] And at the next session a House bill (no. 4678) was reported from the committee on agriculture.[13] In this report much evidence was presented to show the bad conditions which prevailed. The Pennsylvania Society for the Prevention of Cruelty to Animals reported that in a single train load from Chicago 1,500 dead animals had been found, and though a Chicago man stated that there had only been 792, it was bad enough. Another witness said that eastern markets were largely supplied with the meat of diseased animals. Stock was shipped from Chicago to Buffalo without rest making a trip of thirty-eight consecutive hours with nothing to eat or drink. Six per cent of the cattle and nine per cent of the sheep, it was estimated, died on their way to the East.

Shippers complained that they were compelled to pay exorbitant prices for feeding, *e. g.*, $50 a ton for hay. A Boston firm testified that the charges for feeding at Buffalo were so unreasonable that they had built their own yards at a convenient point, when the railways refused to connect with them. The bill proposed to remedy conditions by shortening the time for confining animals without food or water to twenty-four hours. Cattle were to be put in dry pens and properly fed and watered, and reasonable rates charged for feeding and care. If food and water were supplied on the cars daily the animals need not be unloaded. It was not passed.

Again in 1879 a bill relative to the transportation of animals was introduced in the Senate, this time by Mr. McPherson (N. J.). It was referred to the committee on commerce, reported back, amended, discussed, and finally recommitted.

During the 1883–84 session Mr. Hopkins (Pa.) submitted a significant resolution which was agreed to by the House. The gist of it was as follows: whereas the present system of trans-

[11] *H. Jr.*, 1875-76, p. 64, *H. R.* 249. The committee's report showed great evils to exist.
[12] *Cong. Rec.*, 1877, p. 116. S. 84.
[13] *Ibid.*, 1877-78, p. 3143.

porting stock in interstate commerce is barbarous, destructive, a source of disease, uneconomic through death or shrinkage of the cattle, a tax on food, *and the twenty-eight hour act is habitually violated;* and "whereas it has been charged that said railway companies, by a system of favoritism, give to a small number of persons, known as the Association of Eveners,[14] a bonus or gift of about $15 on every carload of beef cattle shipped from West to East, said sum . . . collected by the transporters and paid over to the so-called eveners as a mere gratuity;" resolved that the committee on commerce examine into the matter and inquire what remedies may be adopted.[15] The committee reported at the following session, favoring the resolution.[16] It was impressed with the importance of the subject and the numerous petitions received from the various parts of the country. Foreign markets, too, were often injuriously affected by reports of unwholesome conditions. Statistics were given to show that under favorable conditions on common cars the average shrinkage of cattle between Boston and Chicago was 50 lbs. a head, which shrinkage had been reduced to 17 1-3 lbs. on patent cars.

Finally, in 1886, Mr. Dorsey (Neb.) introduced a resolution that the House committee on commerce be instructed to inquire whether such evils existed and to what extent they might be remedied by law.[17]

It is not to be forgotten that laws like that passed in 1884,[18] which restricted the transportation of livestock affected with contagious diseases, have a bearing in this connection.

Summary

Thus, in the early Seventies, the livestock traffic of the railways having become important and the conditions in the same being very bad, an act was passed regulating such traffic in so

[14] An organization for preventing loss through competition. Certain large shippers were given a rebate for equalizing or "evening," shipments over the various roads. It was adopted in 1875 and terminated with the formation of a successful pool among the Trunk lines in December, 1878. It caused much discussion and met with determined resistance.

[15] See *H. Rep.*, 1884-85, no. 2368.

[16] *Ibid.*

[17] *Cong. Rec.*, 1885-86, p. 3122.

[18] *Statutes at Large*, 23: 32.

far as it was interstate. The act was far from perfect and seems to have been violated on a large scale; but, though not a few bills were introduced for remeding its shortcomings, no further legislation was enacted down to 1887.

This act and the act of 1866 to facilitate commerce are the only two pieces of federal legislation based on the commerce clause of the constitution which were passed prior to the Interstate Commerce Act of 1887. Like the earlier law, its importance in opening the field is noteworthy, and it should be observed that its significance was realized by those who passed it. Mr. Eldridge called it a peculiar bill and deemed the power it would confer on Congress extraordinary; and Mr. Casserly said, "This bill is a new departure in the policy of this government. It is the first time Congress has undertaken to deal with that mighty problem whether the transportation of property upon railroads forming links in communication between state and state is commerce within the meaning of the constitution, in the first place, and whether in the next place, it is politic for Congress to assume the exercise of that power. It is one of the greatest questions which has ever arisen in this body. I have heard senators, and leading senators here, who did not doubt the congressional power, declare, . . . that they shrank from the consequences of exercising it."

Indeed, this act was no sooner passed than it was made an argument for further regulation; and taking into consideration the act of 1866, the argument is a strong one. If Congress had the power to regulate state railway corporations as to their connections for forming continuous lines and to interfere regarding the compensation for interstate traffic; if Congress could constitutionally prescribe conditions of livestock traffic, regulating schedules, compensation for care, etc., and authorizing federal courts to inflict penalties; why was Congress not possessed of power to regulate other details of interstate commerce by railway, including rates?

CHAPTER XXI

DEVELOPMENT OF CONGRESSIONAL INTERPRETATION OF THE "COMMERCE CLAUSE"

Down to the present day the direct regulation of railways, as such, has been based upon that clause of the constitution which gives the federal government power over commerce with foreign nations, Indian tribes, and among the states. This power, as has been the case with other federal powers, has been the object of varying interpretation and has been greatly enlarged in its scope since the constitution was penned—not illegitimately, but by reason of the economic development of the nation.

In 1850 had the question been raised whether Congress had power under the constitution to regulate railway *rates*, the general answer would have been in the negative; and the majority of Americans would have denied the power of Congress to incorporate or construct or in any way interfere with railways outside the territories and the District of Columbia, unless it might be to insure the transportation of the mails or troops and military stores. At that time there were only 9,021 miles of railway in the land, and, during the decade preceding, railway construction, except in New England, had been slow. But three important lines were begun in the Middle West in that time. Moreover the lines of those days were short and through traffic was little developed. Railways were still local "improvements" and did not figure greatly in the interchange of commodities and persons among the states.

During the next decade, however, the railway net was pushed over the Alleghanies and to the Mississippi. The mileage increased to 30,635. Consolidations rapidly took place and the trunk lines were constructed. The railway became an important instrument in commerce among the states, competing with canals and rivers.

Then came the war, when the importance of railways was realized in a national way as never before. Moreover that conflict was a blow to the old states' rights theories and brought strength to the federal government. In the light of constitutional interpretation in general one might almost predict that under such circumstances the prevailing attitude toward government interference with railways would change, and in 1865, three years after the president had been empowered to take over railways, came the great Senate debate on "interstate intercourse" in connection with the Camden and Amboy monopoly.[1] The objections made to the passage of this bill to prohibit the obstruction of interstate commerce by rail were most strongly stated by Senator Morrill (Me.) and Senator Johnson (Md.). Mr. Morrill said that the bill was based upon the power to regulate commerce; that if it were passed Congress would have asserted a principle which would justify the government in establishing rules and regulations in regard to commerce over internal railways precisely as over the navigable rivers of the United States; that custom-house officers might be established at railway depots and all the regulations concerning navigation be applied to these artificial highways.[2] He believed that there was no occasion for the exercise of such a power, and that it would be dangerous. "The system works well enough as it is." Moreover, he held that a railway was to be regarded as "a way for commerce, chartered by a State, built entirely by a State, and entirely within its limits and jurisdiction," and could such a way be interfered with by the government of the United States? Never in the history of the nation had the power over commerce been pushed so far.

Mr. Johnson appealed to the framers of the constitution. They would not have sanctioned such a step. The states alone had power to charter railways and it followed that they alone could regulate them; of the powers which had been supposed to be exclusively vested in the states that of regulating tolls, service, and manner of conducting business was one.

Mr. Howard (Md.) replied that the essence of this argument

[1] See above, p. 224.
[2] *Cong. Globe*, 1865-66, p. 2194.

was that a state had a right to annex any condition which it might see fit to its charters of incorporation and that then it was out of the power of Congress to relieve the community from such conditions, however severe and unjust they might be in their effect upon citizens of other states. He believed that this was ultra vires and wrong as an obstruction to interstate commerce—commerce over which Congress had exclusive control;—and he went so far as to assert that Congress might, in an exigency, regulate ocean freight rates, and for the same reason it had the power to regulate "even tolls in the matter of trade among the States, though we have never exercised it, thus far."

And Mr. Howe (Wis.) also defended the broader interpretation of the power of Congress. "A railroad is a highway, I suppose. These passengers, troops, supplies, mails, and freight are commerce; they make up commerce; they are the incident of commerce; they are included within the term 'commerce' . . . Here is the fact that different railways, different highways operated by steam, are existing in a particular State; here is the fact that each one of them is authorized by the law of that State; but here is the other fact that the right to regulate (interstate) commerce on these highways is in the Congress of the United States. . . . The question is put to me if our power goes so far as to regulate tolls upon commerce . . . that we have the power to regulate tolls in some way, if it be necessary, I have no more doubt than I have of our power to make appropriations."

This debate is illustrative of the difference of opinion which existed in an early discussion of the commerce clause. On the one hand a group of men, many of them far from disinterested, argued that to regulate commerce by interfering with railways would be an unconstitutional limitation of a state's power to charter corporations; while they maintained that "commerce" meant navigation, drawing a specious and illogical distinction between natural and artificial highways. It is noticeable that these men were of the *laisser faire* school of political economy and were inclined to extol the achievements of individual initiative.

On the other hand, a group of men held that in this matter

Congress was supreme. They were able to cite cases in which "commerce" had been held to include more than navigation, foreign or coastwise; and they could see no logic in denying that the essential feature of commerce is exchange, regulation of which may involve either vessels or rolling stock. These men stood for greater centralization of government and were in line with the economic developments of the time. But, as yet, they only contended for the power of Congress to keep interstate commerce free from obstruction—a negative power.

At the 1867–68 session of Congress at least four different resolutions asking reports from various committees on the power of Congress to regulate railway transportation were passed. In response to one of them the House committee on roads and canals gave a divided report, the majority favoring the broad interpretation.[3]

The minority, consisting of M. C. Kerr (Ind.) and W. H. Barnum (Conn.) simply stated their belief that no express power existed in the constitution for such regulation. Congress never had exercised such power and it would transcend the bounds of the constitution and the principles of civil government.

The arguments of the majority seem the stronger. Commerce had been judicially defined to be the interchange of commodities and the intercourse of persons between two or more states, and whatever the means used for the transportation of such commodities or persons they were the instruments of commerce. The constitutional power to regulate commerce was absolute and unqualified, applying both to land and water. "Commerce among the several States," said they, "is not, at this day, exclusively or even mainly carried on by water; other instruments of commerce are now used, unknown to the framers of the Constitution, but which seem as plainly within the letter of the Constitution as the instruments . . . known to the framers of that instrument." Perhaps the influence of the conditions which led to the Granger movement is to be seen in their reference to the growth of new states in the West which depended

[3] *Rep. of Com.*, 1867-68, 2: no. 57.

upon railways for exports and imports, and which might be discriminated against by the railway corporations of other states unless Congress had power to regulate such commerce.

This report constantly refers to the power of Congress to authorize the construction of railways, the minority denying it on the grounds that the constitution does not authorize it and eminent domain lies exclusively in the states. On these points the majority were equally decided: the states' right of eminent domain is qualified by the rights which the constitution has vested in the United States; if the railway corporation is an instrument necessary and proper for carrying into effect the powers vested in the government then Congress has the power to create the corporation.[4]

There was also argument over the significance of the proposed exercise of power with regard to state taxation, the minority claiming that to have effective federal control the states must be deprived of their revenue from railway taxes; the majority arguing that this would not be necessary.

At the following session, in debating a bill to charter three railways leading from Washington, similar opposing views were again expressed,[5] from which it seems desirable merely to quote the words of Senator Sherman (O.) who expressed very clearly the modern idea. "The power over local commerce between the citizens of a State is left exclusively to the States, but commerce among the States is to be regulated by Congress. Railroads are the agents both of local commerce and commerce among the several States. This creates the difficulty of defining the limits of the power of Congress and the States."

The situation during the Sixties seems to have been this: railway companies were predominantly considered the creatures of the states in such a way that Congress could not restrict them without infringing states' rights; but there were many cases in which railways practiced abuses which were so plainly an unjust obstruction to interstate commerce that men sought relief from Congress, and, not wishing to interfere with state charters, proposed federal incorporation of interstate railways; this

[4] Osborn vs U. S. Bank, 9 *Wheaton*, 860.
[5] *Cong. Globe*, 1868-69, p. 203.

brought up the old question as to the right of government to construct internal improvements.

The majority conceded the power of Congress under the commerce clause to prevent in a negative way obstruction to interstate commerce. There was also a growing body of men who mentioned the propriety of regulating rates.

In 1873 we find a new sort of bill under discussion. It was a bill to provide reasonable freight rates between states.[6] Between this date and the discussions of 1865, the Granger movement has arisen; questions of discrimination, and, above all, of reasonable rates have come up for solution; and more positive remedial legislation is demanded.

Among the speakers in support of the bill Mr. Loughbridge (Ia.), Mr. Holman (Ind.), and Mr. McNulta (Ill.) will be mentioned in this brief sketch. Mr. Loughbridge thought there was one certain and reliable remedy,—law. If the commerce clause amounted to anything, it gave the right to protect the people against unreasonable rates, and he would have a law regulating tariffs and charges on railways according to the judgment of a board of experts.

Mr. Holman argued that the principal motive for adopting the constitution was the desire to transfer regulation of commerce from the states to Congress; and, while railways were then unknown, they had now become so powerful as to themselves tax interstate commerce as did the states under the Confederation. To him it seemed that the supreme court decisions favored the power of Congress: Nevada had been forbidden to tax passengers transported beyond her limits on the ground that to do so was to restrict interstate commerce; similarly, the attempt of Pennsylvania to levy a tax of two cents a ton on coal mined in that state and shipped beyond its borders; and Gibbons vs. Ogden, Reading Railroad Company vs. Pennsylvania,[7] and Cooley vs. Port Wardens,[8] were cited. He denied that a state could clothe a corporation with a part of her sovereignty and with unlimited power to tax the people: "If the Dart-

[6] *Cong. Rec.*, 1873-74, H. bill no. 1385; see append., p. 137.
[7] 15 Wall., 232.
[8] 12 *How.*, 299.

mouth College Case sustains such pretension . . . I deny its authority." And finally he emphasized the public character of the railway business.

In the speech of Mr. McNulta is one of the most carefully worked out arguments on this subject to be found in the proceedings of Congress.[9] He begins with the fundamental proposition that "commerce" means traffic or exchange, both by common use and decision of the supreme court. Such being the case, what reason is there for distinguishing among the different agencies by which commerce is carried on—why not regulate railways as well as steamboats on navigable rivers? Both of these points are supported by the supreme court in the Pennsylvania tax case,[10] the court saying, "Beyond all question the transportation of freight, or of the subjects of commerce for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution when to Congress was committed the power to regulate commerce among the several States. . . . Nor does it make any difference whether this interchange of commodities is by land or water. In either case, the bringing of the goods from the seller to the buyer is commerce." Following Redfield, Mr. McNulta argues that if the constitution is to be interpreted so narrowly as to exclude interstate commerce over railways, then steamboats should likewise be excluded, for steam navigation was unknown to the framers. Fifty years before his time this had been urged; but, in Gibbons vs. Ogden, the supreme court had overruled the idea. For at least two reasons the states must not be intrusted with the regulation of interstate commerce: the power by charter or otherwise to fix rates on such commerce, if it meant anything at all, was the power to prohibit, which would be unthinkable; and, on the other hand, the states had shown neither power nor capacity to regulate efficiently. This power, like other powers specifically delegated to Congress, was plenary, complete, and without limitations other than those con-

[9] *Cong. Rec.*, 1873-74, append., p. 99.
[10] 15 *How.*, 232.

tained in the constitution; and involved, furthermore, general, national regulation. To regulate meant to adjust or control. He favored the fixation of reasonable rates by a board of railway commissioners.

William E. Arthur (Ky.) made the strongest attack upon the constitutionality of the bill.[11] His conclusion was that federal power over commerce was not well established, and that it was limited in its objects to safety, equality, and freedom—*i. e.*, it was negative. It could not be extended to include fixing the price of a vendable service. He argued that the power of Congress was not exclusive, but concurrent. In the constitutional convention, August 20, 1787, it was moved and seconded to insert the words "sole and exclusive," before the word "power," and rejected by a vote of 6 to 5; this action he took to be an express refusal to delegate exclusive power. It qualified the grant. Ever since the founding of the nation the states and the federal government had been exercising concurrent jurisdiction, and the demarcation line was too difficult of fixation to warrant the present attempt. The power over commerce with foreign nations seemed to him distinct from that over interstate commerce; for the relations of the government to foreign powers involved international and undefined considerations, while definite objects and partitioned jurisdiction obtained in regard to the states.

Likewise John Atkins (Tenn.) thought the positive action proposed went too far. He was inclined to think that Congress had power over interstate commerce to the extent of enforcing its perfect freedom and preventing obstruction through extortion or state jealousy; but a rate-regulating measure like the one under discussion would lead to the control of all industries in the country and to undue centralization.

In the conclusion reached by the Senate select committee in 1874, it was stated that Congress might prescribe rules and regulations for governing instruments and agencies engaged in transporting persons or commodities between states, whether by land or water; and that the "power to regulate commerce" included the power to aid and facilitate it by appropriate

[11] See *Cong. Rec.*, 1873-74, append., p. 75.

means, such as improving or creating channels of commerce by land or water.[12] They held that prior to the Union the power over commerce lay with the *people* and that it was delegated by the people of the states to the United States, carrying with it supremacy in this sphere. In addition to the cases of United States vs. Coombs, and Philadelphia and Reading Railroad vs. Pennsylvania, the words of Chief Justice Taney in Genesee Chief vs. Fitzhugh were cited to show that land transportation was included: "This power (the commercial power) is as extensive upon land as upon water. The Constitution makes no distinction in that respect. And if the admiralty jurisdiction in matters of contract and tort which the courts of the United States may lawfully exercise on the high seas can be extended to the lakes under the power to regulate commerce, it can with the same propriety, and on the same construction, be extended to contracts and torts on land where the commerce is between different States, and it may also embrace the vehicles and persons engaged in carrying it."[13] Nor did the power over commerce seem merely negative. In the case of foreign commerce, the power over which was derived from the same words of the constitution, positive regulation was exercised over the construction, equipment, and navigation of steamers, etc.; either this was unconstitutional or the power authorized more than a negative disburdening of commerce. That there was danger of abusing a power was no argument against its existence; the same objection would prevent the use of most congressional powers. As to the argument that a railway charter is a contract and inviolable, it was pointed out that the prohibition against violating the obligation of contracts applied only to states. Moreover, the arrangements for through transportation across state lines between railway companies were their private acts, and their charters must have been granted and accepted with the understanding that when they engaged in interstate commerce they became subject to the paramount power of Congress.

An interesting episode which occurred in 1886 during the

[12] There were three members who dissented from this conclusion.
[13] 12 *How.*, 244.

discussion of the interstate commerce bill marks the end of the development now under discussion. Mr. Riddleberger (Va.) moved to lay the bill on the table, and when the motion was put to a vote he was alone in supporting it, the vote standing 54 to 1 against him. He then said, "I wish to call attention to the fact that the vote just taken settles the whole Constitutional question and certainly resolves all that we would call a Democratic States rights party into the one general proposition that the Federal government has a right to control the railroads."[14]

It seems unnecessary to go further into the expression of congressional opinion on the interpretation of the power over interstate commerce. Between 1870 and 1887 there was great development in the opinions of the public and the judiciary. At the earlier date the great majority of railway lawyers and officials held that there was no power whatever in the federal government to control railways or in any way affect their management.[15] But as early as 1878 a bill prohibiting discrimination, pooling, and charging more for a less than a greater distance, actually passed the House. More and more discussions came to center around the necessity for or expediency of exercising such power, those who opposed it falling on the defensive in the matter of constitutionality; until, in the Eighties, we find congressmen generally beginning their long-winded speeches in behalf of federal control of interstate commerce with a paragraph or so of excuse for inserting the cut and dried arguments for the constitutionality of the power. As consolidation and combination grew and discrimination spread, the necessity for positive federal control became more apparent. As James A. Garfield said, in 1874, the answer to the cry of danger from centralization of federal powers is that as the railway is the greatest centralizing force of modern times nothing but a kindred force can control it, and it is better to rule it than to be ruled by it.[16] The weakness of state legislatures in dealing with powerful and unscrupulous railway companies, the impossibility of uniform or effective control through their action became more

[14] *Cong. Rec.*, 1885-86, p. 4402.
[15] *Ibid.*, p. 3728.
[16] *Ibid.*, 1873-74, append., p. 495.

and more apparent. And finally in 1886 the supreme court in the Wabash decision plainly stated the impossibility of effectual state control. The problem had become a national one requiring uniform legislation and as such the exclusive power of Congress over interstate commerce became unquestionable. In 1887 Congress definitely assumed positive control over such commerce.

To the historian it is clear that the interpretation of the commerce clause which came to prevail in 1887 was the result of evolution in economic conditions. There is nothing violent about the process; the development is more consistent and logical than has been the case with other powers. From negative regulation, to partial positive regulation, to general positive regulation has been its course. While earlier political problems still dwelt in the minds of men and railway development had not brought out railway questions of clear national import, individualistic, states' rights interpretation was strong; but commerce is "commerce," and, in a way not dissimilar to that of colonial times, the necessity for federal co-ordination of interstate commerce by land and its instruments, arose. It is true that the relation of the government to foreign commerce differs from its relation to interstate commerce; but in both cases power is derived from the same clause and it does not follow that because there is a different relation that the power is *less* in the one case than in the other. When the development of the railways and of the West made interstate commerce by rail so vastly important as to overshadow commerce by water, the progressive and those whose interests demanded it soon saw the futility of securing the public interest through State action. On the other hand a group of older men, of men whose political prejudices had been gained in the older political and economic schools, together with those whose financial interests were involved in the railways, opposed railway regulation on grounds of constitutionality and expediency. Where there is ground for difference of opinion, in the majority of cases, a man's ideas are colored by his interests. History is full of instances in which, pending economic developments, powers are exercised by certain social units without question of propriety; then, economic conditions change,

and, with equal propriety, those powers are assumed by units better fitted to cope with the new conditions. Whether the interstate commerce act be regarded as virtually an amendment to the constitution or as deciding an open question, the people, through Congress, and the courts, have upheld the views of those who in 1865 argued for railway regulation under the commerce clause.

CHAPTER XXII

THE INTERSTATE COMMERCE ACT OF 1887; EVOLUTION AND PASSAGE

Resumé of Federal Regulation Down to 1874

Looking back over the ground covered in the preceding pages it appears that considerable progress has been made toward the recognition of Congress' power to regulate railways. From a very early time it was realized that the railway was an economically peculiar instrument of transportation, and various propositions for measures of control were put forward. These propositions were not all based upon the same clause of the constitution and varied in their scope with the different economic conditions from which they sprang.

The political relation between the federal government and the territories and the District of Columbia made regulation of railways necessary. The exigencies of the government postal service called attention to railway abuses and brought on discussions of the power of the government to control. In the case of railway bridges the power to regulate interstate commerce has been carried to considerable length. But, above all, the war upheaval of the Sixties and the Granger movement in the Seventies were the forces which led to the longest steps preliminary to a comprehensive interstate commerce law.

In 1862 a bill authorizing the president to take and operate railways for military purposes became a law—a measure based on the power to raise and support an army. In 1865 was passed a law which, in a negative way, regulated interstate commerce by authorizing railways to make connections for interstate shipments with any existing lines in spite of state-backed monopolies. This act was based upon the power to regulate

commerce among the states, and, though it shows a great measure of respect for states' rights, it was an important step in the growth of federal power.

In 1873 came the next legislation. Then an act was passed in regulation of interstate commerce in livestock, the significance of which act seems to have been realized by contemporary congressmen.

Between 1865 and 1887 discussions of the power contained in the commerce clause arose with increasing frequency, and after 1874 it may be said that a law regulating interstate commerce by railway was merely a question of time.

Early Proposals for Rate Regulation—Cheap Transportation

Down to 1868 relatively little was said in Congress concerning the regulation of railway rates. The question was touched upon, or the threat was made; but such control of railways as was most seriously proposed or actually exercised did not lie in the field of rate regulation. As early as 1868, however, clear evidence of the beginning of a movement for such regulation appears. In that year three different resolutions were introduced in Congress which looked toward the control of rates. Two of these resolutions were brought up in the House, both for inquiring into the constitutionality of such action.[1] The Senate agreed to have its committee on commerce inquire into and report on the expediency of regulating railways so as to get uniform and just rates.[2] In 1870 Mr. Williams (Ind.) introduced a joint resolution to inquire into the constitutional power of Congress to regulate and limit the tariff of rates of railway companies extending through two or more states.[3] The following year the Senate agreed to a similar resolution.[4] And in 1872 a resolution was adopted to the effect that the committee on judiciary inquire and report what powers the United States had over interstate commerce by railway and whether such

[1] *Cong. Globe*, 1867-68, pp. 1632, 2331.
[2] *Ibid.*, p. 343.
[3] *Ibid.*, 1869-70, p. 239.
[4] *Ibid.*, 1870-71, p. 569.

power extended to prohibit unequal or oppressive rates.[5] These various resolutions indicate an early period of doubt and inquiry concerning the power of Congress to regulate railway transportation and especially railway rates; in response to the last of the preceding resolutions the Senate committee gave a divided report, the majority refusing to commit themselves on the ground that the subject was novel and required much information which they did not possess; the minority opposing the constitutionality of rate regulation.[6]

The object of rate regulation in this early movement was predominantly cheap transportation, *i. e.*, lower rates rather than more equal rates. There were complaints of discrimination, and some of these resolutions refer to equality of rates, but down to about 1875 these had not reached such proportions and publicity as to demand the center of the stage. This was the time when conditions surrounding the crisis of 1873 called attention to the relatively high level of rates in general. It was the time when the Grangers were agitating for lower rates, and when improvements in waterways and freight railways were sought in order to remedy extortionate charges. This, it will be remembered, was the object of the Windom report—cheap transportation. It was the animus of two of the three resolutions of 1868. It appears in many of the bills introduced; three in 1870 and one introduced by Mr. Marshall (Ill.) in 1871 were bills entitled to promote commerce and cheapen the transportation of mails, etc.;[7] and Mr. Killinger (Pa.) brought forward another to promote a cheap and uniform system of railway transportation.

The McCrary Bill

The passage of the McCrary bill by the House in 1874 may be termed the climax of this earlier movement. The chief provisions of this bill were as follows: it forbade unreasonable and extortionate charges; the president was to appoint a board of nine railway commissioners, whose duty would be to make thorough investigation and prepare a schedule of reasonable maxi-

[5] *Ibid.*, 1872-73, p. 131.
[6] *Sen. Rep.*, 1872-73, no. 462.
[7] *Ibid.*, 1871, p. 732.

mum rates, and they were empowered to demand witnesses, books, documents, etc.; the commissioners were to watch for violations of the act and commence suit when such occurred; the penalty for extortion was made $500 to $5,000 for each offense, damages and attorneys' fees to be paid by the guilty party. Where two or more roads joined in an interstate shipment they were declared one line for the purpose of the act. Section 15, almost as an afterthought, prohibited unjust discriminations, with penalties as for extortion.

This bill was referred to as a pioneer measure and Mr. McCrary stated the object to be to keep as near the common law rules as possible, supplementing them by heavier penalties in the shape of punitive damages.

The debate was strikingly similar to later ones on like bills. Individualistic and *laisser faire* economic ideas played the usual part in opposition. It was argued that to bring about just and reasonable rates by legislative enactment was as impossible as to enact virtue. Granting the constitutionality of regulating commerce, still *rate* regulation lay outside this field and was not necessary to it. Rate regulation must be uniform, if constitutional, and uniformity was economically unthinkable. To be logical, if rates were to be regulated then the components of rates must be also controlled, *e. g.*, price of labor and materials, and the government must be forced to deal with the bond holders. Congress could no more delegate power to make railway rates than the power to make tariff duties; it would be an unwarrantable delegation of legislative authority. Then there were the fears that a commission would be corrupted, and that it would be dangerous to entrust any body of men with such powers. Let the states regulate their railways.

In reply to some of these objections Mr. Hoar (Mass.) and others reasoned that state uniformity of action was impossible and state control was hopeless: The position of the gentlemen on the other side is simply that the constitution gives Congress the power to regulate commerce among the states, in order that commerce may forever be not regulated as far as it is commerce among the states. As to uniformity of federal regulation, the regularity would lie in the rule, not in the application. Nor

were legislative powers to be delegated; but simply, the general rule of the common law being enacted, the commissioners would apply it. As to corrupt commissioners, they could not raise rates and any lowering would benefit the people; and they were to be appointed in such a way as to be above corruption. The courts and the common law as then applied could furnish no adequate remedy; for only the producer who was often not the shipper would be damaged, while some middleman was often the shipper and he would not be interested in getting redress for the producer. The great increase in consolidation through long leases was referred to as an alarming symptom. Even Massachusetts petitioned for the passage of the law and her representative denounced railway "kings" as any western demagogue might have done.

By a vote of 121 to 116 the bill was passed, 53 not voting. It failed, however, to make any progress in the Senate.

The McCrary bill was not the first bill for a federal railway commission. In 1871, Mr. Cook (Ill.) introduced in the House a bill to create a railroad bureau for the United States; which was read a first and second time and referred to the committee on railways and canals.[8] Mr. Hawley (Ill.) in 1873, brought forward a bill to provide for the appointment of commissioners to collect information in regard to the railroads forming lines of commerce between the states.[9] It provided for a body of three eminent and disinterested men to be appointed by the president to collect information and recommend legislation. In this same year Mr. Negley (Pa.) and Senator Windom (Minn.) both presented bills for commissions and hardly a session passed thereafter without several such bills. The influence of English legislation is clearly seen in these measures.

Movement Against Discrimination

As already indicated there was agitation against railway discrimination as early as there was against railway extortion, and the point was merely made that the cheap-rate idea at first

[8] *Cong. Globe*, 1870-71, p. 525.
[9] *Ibid.*, 1872-73, pp. 352, 893.

dominated. In 1872 there were three bills introduced in the House the object of which was to require uniform rates and forbid discrimination between persons and places.[10] In 1873 and 1874 there were similar measures proposed, and in 1875 no less than four bills were specifically directed against discrimination. It is noteworthy that two of these came from a Pennsylvanian representative, and in a speech printed in the *Record* of May 29, 1876, Mr. Hopkins reveals the reason for his activity.[11] He tells of the rapid development that followed the discovery of petroleum in western Pennsylvania, in which development Pittsburg had shared by reason of its convenience as a refining center. Once there had been sixty refineries located at this point; now there was scarcely one-third that number and only half of these had been remunerative. Unlawful combination and oppressive discrimination had been the cause. Early in 1872 the oil producers had been notified that rates would be doubled and such great excitement had prevailed that an investigation had been instituted by Congress. It was then proved that the railways which served the oil-producing territory had combined with the notorious corporation known as the South Improvement Company with the purpose of absolutely controling that vast industry and parcelling its profits among themselves. The railway companies had been forced to cancel their contracts and the charter of the South Improvement Company was repealed. The present mischief, however, was due to the same cause. During the past few weeks he had received petitions from hundreds of the citizens of Pittsburg, the Chamber of Commerce and memorialized Congress, and the laboring men had met to declare their great interest in the matter.

Mr. Wilson (Ia.) on August 4, 1876, threw further light on the situation.[12] At this time a committee of the House had the matter under investigation, and evidence had been taken to the effect that the five leading railways of the country had combined with a group of less than a dozen men to monopolize the petroleum trade. The combination was sealed by contracts

[10] *Cong. Globe*, 1871-72, pp. 1954, 2277, 2298.
[11] *Cong. Rec.*, 1875-76, append., p. 111.
[12] See *ibid.*, p. 278.

which in clear English stated that the railways would use their power to overcome competition with these men. One provision of these contracts Mr. Wilson quoted as follows: "And it is hereby further agreed and covenanted by and between the parties hereto that the party hereto of the second part (the railway) shall at all times co-operate as far as it legally may with the party hereto of the first part against loss or injury against competition, to the end that the party hereto of the first part may keep up a remunerative and so a full and regular business, and to that end shall lower or raise the gross rates of transportation over the railroads and connections as far as it legally may for such times and to such extent as may be necessary to overcome such competition."

In May, 1875, Congress had ordered an investigation of these matters, and the committee had called for papers and subpoenaed witnesses nearly two months prior to the time of Mr. Wilson's speech; but as yet only one witness had appeared and not a single document called for had been produced. This shameful action—almost unparalleled in the history of the American Congress—was being carried on with impunity. The committee made no complaint. Other parties were subpoenaed and again but one appeared, the treasurer of the Standard Oil Company of Cleveland. He admitted practical monopoly, but refused to say or show anything incriminating the railways. Meanwhile a railway director alleged in the evidence to be a member of the combination was sitting with the committee, unsubpoenaed, railway counsel appeared to deny the committee's power, and railway presidents, directors, and minor officials held seats in the House. Mr. Wilson called upon all sections to unite against the common enemy, for both East and West, stockholder and producer, were being exploited by combinations and rings.

In the anthracite coal trade there was also combination accompanied by discrimination which attracted attention and emphasized the necessity for government regulation. Between 1872 and 1876 a traffic pool applied to all competitive traffic. Agreements were formed from time to time in following years and were mentioned in congressional debates.

As early as 1876, too, the discriminations, be they justifiable

or no, on transcontinental traffic which caused so much debate just prior to the interstate Commerce Act were well known. Mr. Hopkins quoted a New York journal to the effect that while it cost $6.00 to ship certain goods from New York to San Francisco, $8.29 was charged to Winnemusco, a point 400 miles east, being the San Francisco rate plus $2.29.

The significance of these bills and discussions of 1876 concerning discriminations is considerable, for it is at about this time that we find the embryo of the Interstate Commerce Bill of 1887. In 1885 it was stated that the bill had its origin in the heat of the Standard Oil conflict in Pennsylvania, being fathered by Mr. Hopkins of that state, and it was charged that the leader of the movement in the House somewhat modified the Hopkins measure of nine years preceding and called it his own.[13] Though there is no truth in the statement if it is intended as a slur upon the integrity of the late Judge Reagan, it is true that the Reagan Bill, so-called, did not come as a bolt from the blue.

The Reagan Bill of 1878

In 1877 we find Congressman J. H. Reagan (Tex.) introducing a bill to regulate interstate commerce and to prohibit unjust discriminations by common carriers, which was referred to the committee on commerce. The following year Mr. Watson (Pa.) introduced a bill having the same title (*H. R.* no. 2546) and it was similarly referred. Then the committee, of which Judge Reagan was chairman, reported a substitute (*H. R.* no. 3547), which substitute was an early variety of the Reagan bills of succeeding sessions. In introducing his substitute Mr. Reagan explained that the original was too technical and verbose, and did not provide against pooling by roads between common termini.[14]

Briefly the bill was as follows: It applied only to interstate commerce and to car-load shipments. It declared it to be unlawful to charge or receive discriminatory rates for like and

[13] *Cong. Rec.*, 1884-85, p. 94-5. Mr. Rice (Mass.).
[14] *Ibid.*, 1878-79, p. 93.

contemporary service. No break nor interruption, nor any contract or agreement should be made to prevent the carriage of any property from being one continuous carriage within the meaning of the act, except where necessary and without wrong intent. To allow rebates, drawbacks, or discriminating advantages in any form; to pool the freights of different and competing roads by dividing among them the aggregate or net proceeds; and to receive greater compensation for less than for greater distances in one continuous carriage, were to be made unlawful. Schedules of rates must be posted by the railway companies plainly stating kinds and classes of property to be carried, places between which property should be carried, and the rate for delivery, loading, unloading, storing, or handling the same. The minimum penalty was put at $1,000, one half to be paid to the informer. Remedy was to be gained through the courts and the procedure was outlined.

The chief objections raised to the bill seem to have been against the long-and-short-haul clause. It was argued that it did not recognize the legitimate distinction between retail and wholesale rates, the latter being justly lower than the former; that the railroads would not be able to serve points where water competition existed; etc.,—arguments which occur during the next eight years with wearisome abundance.

Mr. Reagan stated that it was not the object of the bill in any way to fix rates, but that its end was to prevent rate wars.

The bill was passed by the House December 11, 1878, the vote being fairly close—139 yeas to 104 nays. It was referred to the committee on commerce in the Senate and no further action taken.

Again in 1879 and in 1880 Mr. Reagan introduced his bill, but it made little progress. It was practically the same as the bill which passed the House in 1878, and, again, was brought in as a substitute to another measure, the "Henderson Bill."[15] In the debate of January, 1881, Mr. Reagan stated that there were a few simple rules which would abolish the greater number of complaints against the railways without embarrassing them. The difficulties were to eliminate discrimination between

[15] See *Cong. Rec.*, 1880-81, **11**: 362.

persons, especially rebates and drawbacks, and to maintain competition and prevent pooling. As to discrimination between places the only rule the committee on commerce could recommend was the adoption of a long-and-short-haul clause.

Final Development of the Interstate Commerce Act

The beginning of the final stage in the evolution of the Interstate Commerce Act of 1887 came in December, 1884. Postponing till the following chapter a discussion of the nature and logic of the act, we will here but briefly outline the legislative history of its passage. In the House we find the committee on commerce bringing in a bill, which, as usual, does not satisfy the chairman, Judge Reagan; whereupon he submits a substitute differing in that it contains a long-and-short-haul clause.[16] The House is with Mr. Reagan and passes his bill by a vote of 161 to 75, 87 not voting.[17]

Meanwhile the Senate has been considering the Cullom bill, which has as its main feature the establishment of a commission;[18] and, when the Reagan bill comes up from the House, the Cullom bill is passed by the Senate, January 30, 1885, as a substitute for it, the vote standing 43 to 12, with 21 absent.[19] So the matter stands at a deadlock. A flood of petitions for interstate-commerce regulation is pouring in from citizens and boards of trade everywhere.

It was at this juncture that, on motion of Senator Cullom (Ill.), a select committee of five senators was appointed to investigate and report upon the regulation of railways and water routes. This action resulted in the famous "Cullom Report," submitted to the Senate January 18, 1886,[20] probably the most influential document in shaping the Act of 1887.

At about this time, too, came the celebrated decision in the case of Wabash, St. Louis, and Pacific Railway Co. vs. The State of Illinois. The state supreme court of Illinois had upheld the state in a suit brought against the Wabash for violating its long-and-short-haul clause. The railway then turned to

[16] *Ibid.*, 1884–85; 16: 26 (H. R., No. 5461).
[17] *Ibid.*, p. 554.
[18] *Ibid.*, pp. 51, 328. For parallel digests of the two bills see p. 1085.
[19] *Ibid.*, p. 1254. S. no. 1532.
[20] *Sen. Rep.*, No. 46.

the federal courts with the plea that the state law was unconstitutional as being a regulation of interstate commerce, and finally the United States supreme court reversed the decision of the state courts, upholding the contention of the railway. In his decision Justice Miller said: " . . . when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the states . . . can not be overestimated. That species of regulation is one which must be . . . of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear . . ."[21]

This decision had no slight effect in bringing to pass the Act of 1887; for, in declaring state regulation of interstate commerce unconstitutional, it made federal regulation more imperative.

It is most significant to observe the railway company turning to invoke federal regulation—for it amounted to that—in order to escape the furies of state legislation. The day for consigning "the public" to damnation was passed. Today, twenty years later, the railways are again suffering from a revival of hostile action by the states and again they are turning to the government and supporting a broad federal jurisdiction.

But to continue the thread of legislation. On February 16, 1886, Mr. Cullom reported Senate Bill number 1532 from the committee on interstate commerce.[22] Discrimination in its various forms was stated to be the one great evil against which the bill was aimed. The main outlines of the bill,—which applied to both freight and passenger service by railways, including fast-freight, express, and sleeping-car companies, and water ways only where used in connection with a railway for continuous shipment,—are as follows. Rebates, drawbacks, etc., were prohibited; as was discrimination in general, the provision being adapted from the English law; a greater aggregate charge for a shorter than for a longer distance under substantially

[21] *Cong. Rec.*, 1886-87, **18**: 480 (Jan. 10, 1886).
[22] *Ibid.*, 1885-86, pp. 1464, 33470.

similar conditions over the same line, in the same direction, and from or to the same point was prohibited, but the commission to be created might make exceptions; rates must be published and could not be advanced without ten days' notice; violations of the act were declared misdemeanors punishable by a fine of not over $5,000. The bill provided for five commissioners who were authorized to inquire into the management of the common carriers concerned and obtain all necessary information, invoking the aid of the courts to obtain witnesses, papers, etc., if they desired. Upon complaint the commission would investigate, and, if the facts justified, would notify the district attorney-general, who would prosecute.

This Cullom bill passed the Senate 47 to 4.[23] Upon receiving it the House passed the Reagan bill as a substitute, with 192 ayes, and 41 noes.[24] The two bills differed in scope of application in that the House bill did not apply to passenger traffic, nor did it cover traffic by water. The three chief points of difference were: (1) the Senate bill did not forbid pooling; the House bill did; (2) the Senate long-and-short-haul clause was weak and might be set aside; that of the House bill was rigid; (3) the House bill provided no executive machinery in the shape of a commission, but left enforcement to the courts. Moreover the House or Reagan bill provided for full damages and attorney's fees in case of recovery for discrimination, while the other allowed only the excess over the lowest rate charged for like shipments.

The Senate promptly disagreed to the substitute. There was thus another deadlock, and conferees were appointed by each branch.[25] Early in the next session the committee of conference reported a bill, which, though it was entirely satisfactory to neither side, was passed by the Senate on January 14, 1887, and by the House on January 21 of the same year. The Senate vote was 37 to 12;[26] the House vote stood yeas, 219; nays, 41.[27]

[23] *Ibid.*, p. 4423.
[24] *Ibid.*, p. 7756. Text of Reagan bill as it passed on p. 7753.
[25] *Ibid.*, pp. 7818, 7832.
[26] *Ibid.*, 1886–87, p. 633.
[27] *Ibid.*, p. 881.

APPENDIX A.

THE REAGAN BILL: 1878

AN ACT

TO REGULATE INTER-STATE COMMERCE AND TO PROHIBIT UNJUST DISCRIMINATIONS BY COMMON CARRIERS.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that it shall be unlawful for any person or persons engaged alone or associated with others in the transportation of property by railroad from one State or Territory to or through one or more other States or Territories of the United States, or through or from any foreign country, directly or indirectly to charge to or receive from any person or persons any greater or less rate or amount of freight, compensation, or reward than is charged to or received from any other person or persons for like and contemporaneous service, in the carrying, receiving, delivering, storing, or handling of the same. And all persons engaged as aforesaid shall furnish without discrimination, the same facilities for the carriage, receiving, delivery, storage, and handling of all property of like character carried by him or them, and shall perform with equal expedition the same kind of services connected with the contemporaneous transportation thereof as aforesaid. No break, stoppage, or interruption, nor any contract, agreement or understanding, shall be made to prevent the carriage of any property from being and being treated as one continuous carriage, in the meaning of this act, from the place of shipment to the place of destination, unless such stoppage, interruption, contract, arrangement, or understanding was made in good faith for some practical and necessary purpose, without

any intent to avoid or interrupt such continuous carriage, or to evade any of the provisions of this act.

SEC. 2. That it shall be unlawful for any person or persons engaged in the transportation of property, as aforesaid, directly or indirectly to allow any rebate, drawback, or other advantage, in any form, upon shipments made or service rendered, as aforesaid, by him or them.

SEC. 3. That it shall be unlawful for any person or persons engaged in the carriage, receiving, storage, or handling of property, as mentioned in the first section of this act, to enter into any combination, contract, or agreement, by changes of schedule, carriage in different cars, breaking car loads into less than car loads, or by any other means, with intent to prevent the carriage of such property from being continuous from the place of shipment to the place of destination, whether carried on one or several railroads. And it shall be unlawful for any person or persons carrying property, as aforesaid, to enter into any contract, agreement, or combination, for the pooling of freights, or to pool the freights, of different and competing railroads, by dividing between them the aggregate or net proceeds of the earnings of such railroads, or any portion of them.

SEC. 4. That it shall be unlawful for any person or persons engaged in the transportation of property, as provided in the first section of this act, to charge or receive any greater compensation per car load of similar property for carrying, receiving, storing, forwarding, or handling the same for a shorter than for a longer distance in one continuous carriage.

SEC. 5. That all persons engaged in carrying property, as provided in the first section of this act, shall adopt and keep posted up schedules, which shall plainly state:

First, the different kinds and classes of property to be carried;

Second, the different places between which such property shall be carried;

Third, the rates of freight and prices of carriage between such places, and for all services connected with the receiving, delivery, loading, unloading, storing, or handling the same.

Such schedules may be changed from time to time as herein-

after provided. Copies of such schedules shall be printed in plain, large type, at least the size of ordinary pica, and shall be kept plainly posted for public inspection in at least two places in every depot where freights are received or delivered; and no such schedule shall be changed in any particular except by the substitution of another schedule containing the specifications above required, which substitute schedule shall plainly state the time when it shall go into effect, and copies of which, printed as aforesaid, shall be posted as above provided, at least five days before the same shall go into effect; and the same shall remain in force until another schedule shall, as aforesaid, be substituted. And it shall be unlawful for any person or persons engaged in carrying property on railroads as aforesaid, after thirty days after the passage of this act, to charge or receive more or less compensation for the carriage, receiving, delivery, loading, unloading, handling, or storing of any of the property contemplated by the first section of this act than shall be specified in such schedule as may at the time be in force.

SEC. 6. That each and all of the provisions of this act shall apply to all property, and the receiving, delivery, loading, unloading, handling, storing, or carriage of the same, on one actually or substantially continuous carriage, or as part of such continuous carriage, as provided for in the first section of this act, and the compensation therefor, whether such property be carried wholly on one railroad or partly on several railroads, and whether such services are performed or compensation paid or received by or to one person alone, or in connection with another or other persons.

SEC. 7. That each and every act, matter, or thing in this act declared to be unlawful is hereby prohibited; and in case any person or persons, as defined in this act, engaged as aforesaid, shall do, suffer, or permit to be done, any act, matter, or thing in this act prohibited or forbidden, or shall omit to do any act, matter, or thing in this act required to be done, or shall be guilty of any violation of the provisions of this act, such person or persons shall forfeit and pay to the person or persons who may sustain damage thereby a sum equal to three times the amount of the damages so sustained, to be recovered by the

person or persons so damaged by suit in any district or circuit court of the United States, where the person or persons causing such damage can be found, or may have an agent, office, or place of business; and the person or persons so offending shall for each offence forfeit and pay a penalty of not less than one thousand dollars, to be recovered by the United States, by action in any circuit or district court aforesaid, one-half of such penalty or penalties, when collected, to be paid to the informer. Any action to be brought as aforesaid to recover any such penalty or damages may be considered, and if so brought shall be regarded as a subject of equity jurisdiction and discovery, and affirmative relief may be sought and obtained therein. In any such action so brought as a case of equitable cognizance, preliminary or final injunctions may, without allegation or proof of damage to any plaintiff or complainant, be granted upon proper application, restraining, forbidding, and prohibiting the commission or continuance of any acts, matters, or things, within the terms or purview of this act, prohibited or forbidden. In any action aforesaid, and upon any application for any injunction above provided for, any director, officer, receiver, or trustee of any corporation or company aforesaid, or any receiver, trustee, or person aforesaid, or any agent of any such corporation or company, receiver, trustee, or person aforesaid, or of any of them alone or with any other person or persons, party or parties, may and shall be compelled to attend, appear, and testify and give evidence, and no claim that any such testimony or evidence might or might tend to criminate the person testifying or giving evidence shall be of any avail, but such evidence or testimony shall not be used as against such person on the trial of any indictment against him. The attendance and appearance of any of the persons who as aforesaid may be compelled to appear or testify, and the giving of the testimony or evidence by the same, respectively, and the production of books and papers thereby, may and shall be compelled, the same as in the case of any other witness; and in case any such deposition or evidence, or the production of any books or papers, may be desired or required for the purpose of applying for or sustaining any injunction aforesaid, the same, and the production of books and papers,

may and shall be had, taken, and compelled, by or before any United States commissioner, or in any manner provided or to be provided for, as to the taking of other depositions or evidence, or the attendance of witnesses, or the production of other books or papers, in or by chapter seventeen of title thirteen of the Revised Statutes of the United States. In actions to be brought as aforesaid, damages sustained in the period of a month or part of a month may be regarded as and counted or declared upon, or complained of generally, and as one separate cause of action, and so, whether such damages be sustained in one month or in different months; and such separate causes of action may be joined in the same action. No action aforesaid shall be sustained unless brought within one year after the cause of action shall accrue.

SEC. 8. That any director or officer of any corporation or company acting or engaged as aforesaid, or any receiver or trustee, lessee, or person acting or engaged as aforesaid, or any agent of any such corporation or company, receiver, trustee or person aforesaid, or of one of them alone, or with any other corporation, company, person, or party, who shall directly or indirectly do, or cause or willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or forbidden, or directly or indirectly aid or abet therein; or shall directly or indirectly omit or fail to do any act, matter or thing in this act required to be done, or cause or willingly suffer or permit any act, matter, or thing so directed or required to be done not to be so done; or shall directly or indirectly aid or abet any such omission or failure; or shall directly or indirectly be guilty of any infraction of this act, or directly or indirectly aid or abet therein, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one thousand dollars.

SEC. 9. That nothing in this act shall apply to the carriage, receiving, storage, handling, or forwarding of property less than an ordinary car load, or wholly within one State or Territory, and not destined for carriage in another State or Territory, or going to or coming from some foreign country, or to property carried for the United States at lower rates of freight and charges than for the general public, or to the transportation of

articles free or at reduced rates of freight for charitable purposes, or to or from public fairs and expositions for exhibition.

SEC. 10. That the words "person or persons" as used in this act, except where otherwise provided, shall be construed and held to mean person or persons, officer or officers, corporation or corporations, company or companies, receiver or receivers, trustee or trustees, lessee or lessees, agent or agents, or other person or persons acting or engaged in any of the matters and things mentioned in this act.

Passed the House of Representatives December 11, 1878.

Attest: GEO. M. ADAMS,
Clerk.

CHAPTER XXIII

THE INTERSTATE COMMERCE ACT OF 1887: ITS COMPOSITION AND LOGIC

There were four chief matters at issue throughout the debates on the interstate commerce bills: (1) a commission, (2) the anti-rebate provision, (3) an anti-pooling provision, and (4) a long-and-short-haul clause. The Senate majority favored a federal commission and the permission of railway pooling; it tolerated a weak and elastic long-and-short-haul clause and an anti-rebate provision. The great majority of the House were opposed to a commission, pooling, and rebating, and favored a rigid long-and-short-haul clause. Obviously here is a situation which calls for compromise.

The Compromise

From the view point of Mr. Cullom and the Senate majority the chief change made in the conference bill[1] lay in the provision which forbade pooling (s. 19). This was their great concession. Mr. Cullom stated that the conference bill was practically the same as the Senate bill excepting that it prohibited pooling.[2]

Other modifications of the Senate bill were as follows.[3] The District of Columbia was included in its scope and the term, railway, was defined to include "all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease" (s. 1). Provisions concerning damages were taken out and combined in a new section with an

[1] The bill proposed as a compromise by the conference committee.
[2] *Cong. Rec.*, 1886-87, p. 171.
[3] *Ibid.*, p. 170.

additional provision allowing a reasonable counsel's or attorney's fee in case of recovery (ss. 2, 3, 4). The section requiring carriers to furnish reasonable and proper facilities was amended to require proper and *equal* facilities (s. 3). A change in the long-and-short-haul clause was considered to be of some importance. The words of the Senate bill, "from the same original point of departure or to the same point of arrival" were stricken out and the formula, "the shorter being included within the longer distance," was inserted. The provision authorizing the commission to make exceptions to the clause was also slightly modified with the idea of greater rigidity. Section five of the Senate bill was replaced by section six of the conference bill which was a combination of the House and Senate provisions concerning publicity of rates. The new section not only directed the commission to secure publicity of rates over each railway and connecting lines, but also required each railway to publish rates between all points on its line.

Senator Platt was the only one of the conferrees who did not sign the conference report, basing his action upon the objectionable change in the long-and-short-haul clause, and, above all, upon the insertion of an anti-pooling provision.[4]

On the other hand, the changes and concessions as stated by the House conferrees were the following.[5] The most important addition came in the provision for a commission. Furthermore the House bill had applied to freight transportation alone, whereas the conference bill included passenger service; and the House bill was also broadened by the inclusion of transportation partly by water when used under common control with a railway for a continuous interstate shipment. The long-and-short-haul clause was modified by allowing the commission to make exceptions. As to publicity, the House bill had required the public posting of rates by the railways; the conference bill required carriers after ninety days to keep printed schedules of rates and fares for public inspection.

Upon the completion of the conference report a member of the minority in the House committee on commerce stated his

[4] *Ibid.*, p. 360.
[5] *Ibid.*, p. 695.

joy that much of the unreasonable part of the Reagan bill had been knocked out of it.

On the whole it would seem that the House or Reagan bill was the more radically amended at the hands of the conferees, though it should not be forgotten that the original Cullom or Senate bill had been already considerably modified in the direction of the House bill.

It is not surprising that, having such a composite origin, the Interstate Commerce Act pleased no one entirely. As Mr. Johnson (N. Y.) remarked, "It has been said . . . that this is a bill that, practically no one wants and yet everybody will vote for; that, practically no one is satisfied with and yet they are all ready to accept it; a bill that no one knows what it means and yet all propose to try the remedy provided therein."[6] The passage of federal regulation had become evidently imperative. The press, chambers of commerce, and the people in general loudly and insistently demanded action. State regulation of interstate commerce had proved futile and had been declared unconstitutional. It had become necessary for congressmen to settle longstanding differences of opinion, and a compromise was the inevitable result.

Never did Congress face a problem which involved more weighty issues, and never was a knowledge of the economic factors concerned more needed. Yet it was often stated that the Senate rarely showed greater hesitancy and ignorance on any subject than on railway regulation. "The modesty and meekness and confession of ignorance is amazing," said one speaker;[7] and, after all allowance has been made for the coy hypocrisy of railway congressmen, it is still largely true. There can be no doubt but that the realization of this was the factor which turned the scale in favor of a commission. Not a few of the speeches, however, show careful thought, and the few books on transportation which existed at the time,—Adams, *Railroads, Their Origin and Problems* (1878); Hadley, *Railroad Transportation* (1885); Hudson, *The Railways and the Republic*,—were often quoted in debate. Especially should the importance

[6] *Ibid.*, p. 844.
[7] *Ibid.*, 1884-85, p. 752.

of Charles Francis Adams, Jr., and his work be observed. His writings were quoted at length and not a few followed him in upholding the good of pooling and decrying railway competition.

It will now be well to consider separately the congressional logic in passing some of the more important provisions of the act.

Pooling. Almost without exception those congressmen who were interested in railways in a practical way or who were versed in railway economics were inclined to favor pooling; while the majority of the remainder thought it should be prohibited. Judge Reagan stated the objections to allowing pooling as follows:[8]

1. It destroys competition in freight rates.
2. It makes one great monopoly out of several smaller ones.
3. It secures to the pooling roads the power to levy such exactions on commerce as their cupidity may demand.
4. It enables them to make their roads a means of oppression and ruin to the people.
5. Such power never has been and never can be safely surrendered by a free people to a few men who deny their responsibility to the public.

And the question was frequently raised, "granting railways can *maintain* rates if pooling is allowed, what is to prevent their using the same means to *raise* them?"

In reply it was argued that rates had steadily declined in the presence of pools. The object of pooling was not to raise rates, but to prevent rate wars and cut-throat competition by removing the incentive. Mr. Sewell (N. J.) was among those who defended it.[9] He held it to be the one remedy for discrimination, and maintained that water competition would keep rates down. A few like Senator Brown (Ga.) predicted an increase in consolidation as a result of prohibiting pooling, the soundness of which prediction has been abundantly proved. Those who upheld pooling sometimes argued that the anti-pooling provision

[8] *Ibid.*, 1884-85, p. 289.
[9] *Ibid.*, pp. 441-2.

was unnecessary in connection with the strict provisions against discrimination in any form—a purely negative argument.

On the other hand it would be maintained that other provisions of the bill would make pooling by the railways unnecessary, because publicity of rates and a long-and-short-haul clause would make fluctuations and rate wars impossible, which is, again, but a negative argument for retaining an anti-pooling clause.

The Senate committee of investigation in the so-called Cullom report of 1886 did not commit itself very strongly on the subject. Stating that publicity of rates would restrain reckless competition, it concluded that it did not seem prudent to recommend an anti-pooling section on the one hand, nor, on the other, the legalization of pooling.[10] The prohibition of pooling was being asked, to remove the evils of the system as it had been conducted and to avert the dangers feared from greater aggregation of corporate power. But the evils attributable to pooling were not the most pressing. The majority preferred to leave the subject for investigation by the commission.

A majority of the witnesses heard by the committee on this subject testified to the benefits of pooling, many railway officials suggesting that such agreements be made legally binding.

After all has been said, there were the two underlying questions: (1) was it logical to foster competition and prohibit pooling while seeking stability and equalty of rates; (2) was it safe to allow pooling, in which there was a possibility of evil monopoly and secret extortion? We can see, as few then saw, that, though a pooling agreement does not primarily concern rates, under private ownership the rate is the center of the problem; if pooling is to be allowed, then rates should be regulated to safeguard public interests, unless all reasonable possibility of abuse be in some way removed; if pooling is to be prohibited rates should also be regulated in order to protect the railways, unless some other means of restraining competition be in force. It was not proposed to regulate rates in 1887, and the various provisions which might prevent the abuse of pooling or restrain

[10] Rep. of Sen. Select Committee on Interstate Commerce, 1886 (No. 46), p. 201.

undue competition were untried and doubtful; therefore, to those whose one end was immediate public welfare, it seemed too dangerous to allow pooling agreements; and, on the other hand, to those whose interests were in the railways, to prohibit pooling seemed a great and harmful step backward. The view taken by the Cullom report was the expression of the wisdom of the time.

As is well known, the anti-pooling provision was inserted in the Interstate Commerce Act at the last moment through the insistence of one man, Judge Reagan.

Long-and-Short-Haul Clause. There was certainly more confusion and perhaps more difference of opinion with regard to the prohibition of charging more for a less than for a greater distance under similar conditions than existed with regard to any other phase of railway regulation. There was no one who did not admit that there were some cases of injustice which might be prevented by a long-and-short-haul clause; but beyond that there were all shades of opinion, ranging from the belief that most cases of charging less for a longer distance were justifiable to the opposite view.

A long-and-short-haul clause was not a new measure. In some form or other it was in force in at least the states of Arkansas, Missouri, California, Pennsylvania, and Massachusetts. In addition to the natural feeling of injustice at seeing the same kind of freight go by on the same railroad in the same direction at a lower rate than was charged to one's own town—a circumstance which would, at first glance, fill anyone with anger—there was the widespread belief that population was being too rapidly centralized in great cities. As Senator George (Miss.) put it, "The practice of high local freights and differential rates as against the small shipper has prevented all commerce and traffic between the producer and consumer and made necessary the concentration of these products in large cities, where they become the subject of speculation in futures and gambling by corners . . . From some observation of these matters I feel justified in saying that high local rates and discrimination against retailers have caused the consumers in the South . . . to pay higher for the wheat, corn, flour, and meat of the West

than those products are sold in Europe.''[11] It was believed that it was the policy of railways to build up large centers and the jobbing business of those centers by low through rates, rates which discriminated against small places and businesses.

It was charged that the railways indulged in cut-throat rate wars in their through traffic which profited competitive points at the expense of the non-competitive, and there is no doubt that in some cases the railways did carry competitive traffic at such low rates as to make it necessary to recoup themselves from high local rates. *To the extent that this was the case* there was force in the argument that an effective long-and-short-haul clause would largely prevent rate wars by making them impossible.

The chief argument against a long-and-short-haul clause of any description lay in the necessity for low rates on long hauls. Mr. Brown (Ga.) assumed the case of a farmer twenty miles distant from Atlanta and having ten tons of corn to market.[12] Surely $5, or 2.5 cents per ton per mile, would not be an unreasonable rate. But at that rate to ship corn from Kansas City to Atlanta would cost a farmer $250 a carload, or 71 cents a bushel. Would the western farmer or the southern planter desire that? A long-and-short-haul clause would prevent low through rates and limit markets.

Not a few westerners opposed the clause for the same reason. Mr. Bragg (Wis.), for example, argued that, as the West owed its development to low through rates and a long-and-short-haul clause would raise rates, that section of the country would be injured.[13] The clause seemed to him at variance with business principles in failing to recognize that wholesale business is done at lower rates than retail—but here it should be remembered that the clause did not forbid as low a charge for a longer distance as for a shorter. Others feared that the price of western products and of western lands would decline, etc., etc.[14] Senator Cullom maintained that to pass a rigid law prohibiting a

[11] *Cong. Rec.*, 1884-85, p. 355.
[12] *Ibid.*, p. 760.
[13] *Ibid.*, 1886-87, p. 842.
[14] *Ibid.*, p. 607.

greater charge for a shorter haul would injure the great agricultural West and all interested in eastbound traffic.[15]

The same argument was used at the other end of the line, representatives from New England, New York, and Florida opposing it on similar grounds.

Against a rigid clause it was argued that water carriers and intrastate and Canadian lines would profit; for the railways subject to the act would then be unable to compete profitably. The familiar point that by the addition of a cheap through traffic lower rates may be levied on the local traffic was often made.

Mr. Rice (Mass.) held that competition would be destroyed: "Here is a road between two cities two hundred miles long. Here is another road going another route between the same termini three hundred miles long. Now this second road can only carry freight between the terminal points as cheaply as the other does;" therefore under a long-and-short-haul clause, it must either cease to compete or charge losing rates on local traffic.[16]

The Senate committee, whose report was so influential, did not doubt the injustice of charging more for a shorter than for a longer haul under most circumstances; but thought it inexpedient to enforce a rigid prohibition of such charges, fearing that competition would be stifled in many cases and the country be deprived of low through rates to tide-water.[17] A large majority of the witnesses examined had urged the incorporation in the bill of some provision as to long and short hauls, and the committee was convinced of the necessity for legislation on the subject. "Such legislation must of necessity be largely experimental, and its effects cannot be accurately determined in advance."[18]

There was great confusion in the minds of congressmen as to the exact significance of the long-and-short-haul clause. "Where one member says, 'I will vote for that phraseology, because it

[15] *Ibid.*, 1884-85, p. 686 circa. See also p. 119, Mr. Davis.
[16] *Ibid.*, p. 99.
[17] Report, p. 195.
[18] *Ibid.*, p. 197.

means so and so;' and another says, 'I will vote for it means exactly the reverse,' I say in that case there is not that consensus of legislative intention which makes the proper enactment of law,"[19]—these words of Mr. Dibble's (S. C.) were very significant and apropos. Some persistently labored under the delusion that the clause had a pro rata effect and would mean equal mileage rates. The most serious haziness occurred with regard to the phrase, "substantially similar conditions." Did competition in any form constitute a condition? did export trade? There was a determined effort to get an expression of opinion on this point from the Senate conferrees,[20] but these gentlemen stated that the interpretation of the measure was a matter for the courts to decide and that each member in voting was to consider what he thought the courts' interpretation would be. Mr. Hoar (Mass.) read a letter from Mr. Crisp, a House conferree, to the effect that export trade, and competition did constitute circumstances and conditions which might be justification for an exception to the clause. There is, however, no evidence that this was the general idea.

There was also difference of opinion as to whether or not the term "line" would include more than the railway controlled by a single company, a point which was to be settled by judicial interpretation some years later.

A Commission. The majority of the Senate always favored a commission, and it is believed that, in 1887, this might be said of the House. In 1884, however, the majority of the House stood with Judge Reagan in opposing such a body; and when it was moved to amend the House bill by adding a provision for a commission the motion was lost by a vote of 96 to 126, 101 not voting.[21] Mr. Reagan expressed his views in these words: "In opposition to placing this great interest in the hands of a commission, . . . the substitute (Reagan) bill declares what shall be done and what shall not be done . . . and after giving all the necessary remedies on the criminal and civil docket, I propose to give equitable powers, so as to compel par-

[19] *Cong. Rec.*, 1886-87, p. 839.
[20] *Ibid.*, p. 571 ff.
[21] *Ibid.*, 1884-85, p. 552.

ties to testify and produce books and papers, in order that the ends of justice may be fairly attained . . .''[22]

This statement implies what was the great objection of a large number of anti-commission men. They looked upon a commission as a substitute for action, as a mere sop thrown to the public instead of a remedy for the evil; and they demanded strict legislation against pooling, rebates, etc., to be enforced by the courts, ''which are within convenient reach of the people, and with whose methods of procedure they are familiar.'' It was maintained that a commission was un-American and undemocratic.[23] Yet a large number of the states had railway commissions at the time, which fact Judge Reagan appears to have overlooked, although he saw their provisions concerning pooling and long-and-short hauls.

It was urged that so small a number of men could not possibly supervise so great a railway system.

And that they could maintain their integrity in the face of such corrupting pressure as would be brought to bear upon them was gravely doubted.

It was a class of men very different from those who objected to a commission as being a sham and un-American, which argued against its constitutionality. These, generally lawyers, said that Congress would be delegating legislative powers—which was in itself unconstitutional—and would be combining legislative, executive, and judicial functions in one body, a palpable violation of the constitution.[24]

Mr. Cullom advanced the following arguments for a commission: (1) The mere fact of its existence would prevent abuses, —a fact attested by experience with state commissions. (2) Backed by public opinion many cases would be decided out of court. (3) The shipper would have a prima facie case made out and prosecuted by the government. Its value as an investigating body of experts was also realized.

[22] *Ibid.*, p. 51. Later Mr. Reagan moved to substitute his bill for the first seven sections of the committee bill, leaving the commission sections intact; but this was a concession of expediency and he remained opposed to a commission.

[23] *Ibid.*, 1885–86, p. 7280–4.

[24] *E. g., ibid.*, 1884–85, p. 568.

In reply to those who clamored for more direct action it was shown that in practice the people unaided failed to find a remedy in the courts. This had been made clear by English experience.[25] Moreover, the direct-activity men seemed to forget that rebates, pooling, extortion, and discrimination were forbidden, as they desired; and, simply, the commission was the executive board for securing the enforcement of the law.

Nor did the act prevent, but specifically authorized pursuing the ordinary means for obtaining a remedy through direct application to the courts.

The fact seems to be that the above objections to a commission were brought forth at the earlier stages of the evolution of the act when commissions, purely advisory, were proposed for purposes of investigation, and continued to be repeated in the parrot-like way that characterizes both the obstinate and the uninformed. On a par with this objection was the hazy notion that the Reagan bill—among its other "iron-clad" characteristics, so-called—in some way regulated rates. Mr. Reagan once said, "One of the greatest troubles I have had even with the friends of legislation in this direction has been to get them to understand that this (the Reagan bill) is not a bill to regulate frieght rates. . . . I know the difficulties which would attend any measure attempting to prescribe rates of freight. I am persuaded that no law fixing rates of freight could be made to work with justice either to the railroads or to the public; and I have intended from the beginning to avoid that difficulty."[26]

Overcapitalization. One other topic which occupied much space in the discussion of railway regulation was overcapitalization and watered stock. Statistics from *Poor's Manual* were frequently cited to show gross overcapitalization, the average capitalization being over $62,000 per mile in 1883, while the average cost was stated to be about $30,000 a mile. Cost was generally considered to be the proper basis for determining reasonable rates, and even a railway valuation was proposed. Some were in error in thinking that improvements and extensions

[25] Hadley was quoted to the contrary, but, then, as now, Mr. Hadley's pessimism on this subject had little effect on the majority.

[26] *Cong. Rec.*, 1884-85, p. 533.

should not be capitalized and no doubt the element of risk was underestimated by such. As no legislation was passed on this subject further discussion seems unnecessary.

Economic Fallacies

A few of the more patent economic errors often exhibited in the discussion may be mentioned, in addition to those concerning capitalization, to which reference has just been made.

It is true, as was implied by one speaker, that if a shoemaker sold each pair of shoes at a loss his loss would be proportionate to his sales; but evidently this reasoning overlooks the fact that, as expenses per shoe may be reduced as the scale of production increases, the loss per pair may vanish and become a gain. In the same way, as every beginner in transportation knows, as the number of ton miles increases expenses do not increase in proportion and what would be a losing rate may become profitable. This was not clearly understood by many a congressman who voted on the Interstate Commerce Act.

Then, too, there were relatively few who grasped the idea that the railway business has its economic peculiarities, though men like Mr. Platt (Conn.), Sewell (N. J.), and Brown (Ga.) explained the case.[27] The majority believed in the good old "natural laws" of trade and the efficacy of competition. But the more progressive or thoughtful minority showed that railway transportation is not the same as other business; that once built a railway will not be readily abandoned but even when bankrupt will continue to compete as "a potent factor for good or for evil;" and that this fact was emphasized and the situation made worse by receiverships. Furthermore a large part of the expenses of railways are fixed and do not vary with the amount of business done; hence there is not the connection between cost and rates of charge which exists in most other businesses.[28] In justice to those who argued that ruinous competition was not necessary with railways it should be observed that the tendency might be admitted while holding that legislation might, by maintaining and equalizing rates, prevent or diminish the abuse.

[27] See *e. g., Cong. Rec.*, 1886-87, p. 393; and *ibid.*, 1884-85, p. 440 ff.

[28] No expression of the idea of joint costs has been found by the writer.

Other congressmen erred in maintaining that reasonableness of rates depends on cost alone. This is obviously impossible where the relation between cost and value is not certain.[28]

The argument which would have had it that the railway rate was a tax on production is faulty in not taking into consideration the fact that the transportation charge is a factor in the supply of the commodity. The price of grain at New York, it is true, was determined by the action and reaction of the forces of demand and supply; but the cost of transporting the grain thither is an element in the price. Thus to argue—as for any considerable period—that the price is fixed at New York and then the railway levies its rate tax, gets the cart before the horse. With competition the supply price would equal an amount sufficient to cover expenses and usual profits in the production of grain for New York, which production would include creation of both form and place utilities, *i. e.*, farming and transportation. With transportation monopolized, the supply price at New York might be greater according as the demand varied; but the surplus over costs would go to the monopoly holder, the railway. Only the farmer's ability to withhold his produce would enable him to share in such a surplus. Part of the railway rate, then, is a cost; part may be a monopoly gain; but no part is a tax on the production of grain.

The false distinction between "transportation" and "production" here as elsewhere works confusion.

The various underlying philosophies held by those dealing with railway problems may be analyzed into four groups. There are two short-sighted classes: one of these looks for the immediate public welfare in strict railway regulation, regarding railway corporations with hostility, and its tendency has always been more or less blindly toward government ownership; the other is primarily interested in defending railways from the former. The one emphasizes the public aspect of the railway as a public highway and common carrier, making demands incompatible with efficient private ownership; the other dwells upon the private capital invested and the beneficence of its activity. A small third class stands for public ownership of transportation agencies, believing that only thus can their pub-

lic functions be properly subserved. Lastly comes the dominant group which sees in the railway question the problem of combining public service and private ownership. The duty of railway corporations as common carriers and public highways are recognized; but also it is believed that the most efficient service is only to be obtained through private initiative, and hence private capital must receive adequate compensation to insure the maintenance and progress of the nation's railway system. This philosophy it was that won in 1887. It is markedly opportunist as an economic policy and is best fitted for a rapidly developing railway situation. Whether the time may come when the best interests of the nation demand some basis of operation which is hardly consistent with private profit is not known.

The spirit of the Interstate Commerce Act of 1887 is well expressed in the words of the Senate select committee, when, in 1886, it reported: "In undertaking the regulation of interstate commerce Congress is entering upon a new and untried field. Its legislation must be based upon theory instead of experience, and human wisdom is incapable of accurately forecasting its effect upon the vast and varied interests to be affected."[29]

[29] P. 214.

CHAPTER XXIV

THE DEVELOPMENT OF REGULATION FOR SAFETY

One factor working in common with abuse of livestock, discrimination in rates, and other railway evils toward the enactment of government regulation, was the great loss of life in connection with railway transportation. As the railway net spread and traffic grew accidents increased in number, until the demand for government intervention was finally met in 1893, shortly after the end of our period.

Three distinct phases of this factor may be recognized: passengers, railway employees, mail clerks and the mail service. The interests of all were to a considerable extent identical, but differed somewhat in the extent and method of the remedy. This preliminary generalization will be illustrated by the sketch of propositions for safety regulation which follows.

Safety of Passengers: 1866–1882

The first measure looking toward safety in railway travel was a bill introduced by Mr. Lawrence (O.) in 1866. Its object was to punish for throwing trains from railway tracks. It was referred to the committee on the judiciary and not reported.

Two years later the real history of this subject began. In 1868 a long agitation for safety of railway passengers was opened by Mr. Moorhead (Pa.) with this pioneer resolution: "Whereas, The late loss of life and injury to persons by railroad accidents and the destruction of the cars by fire call loudly for a remedy; Therefore, Resolved, That the Committee on Commerce be requested to inquire into the power and authority of Congress to make regulations in relation thereto, and if such power exists, then the propriety of having a Government inspec-

tion of the rails and other materials used in the construction of railroads and of substituting iron for wood in the construction of all cars used for carrying passengers and mails."[1] The resolution was submitted with unanimous consent, and was agreed to; but, whether the committee doubted Congress' power in the premises, or whatever the reason, it made no report.

The singleness of Mr. Moorhead's motive is open to question as the profits of Pennsylvania's iron masters may well have figured along with the safety of the travelling public. The Camden and Amboy disaster of March, 1865, however, was fresh in men's minds. Then the Washington train plunged into the rear end of a passenger train, killing ten and wounding forty, fire adding its horrors.

Other accidents followed, such as that at Carr's Rock on the Erie in 1867, when, as a result of a broken rail, twenty-four lives were lost and eighty persons were injured; and the New Hamburg collision in 1871, when fire made it impossible to identify the dead. It was estimated that in Pennsylvania alone 3,181 were killed and 4,361 injured in railway accidents between 1866 and 1871.

In the latter year the Senate passed resolutions looking toward a law for the regulation of railways so as to prevent loss of human life and promote the safety of passengers;[2] and in 1872 the House agreed to a resolution instructing the judiciary committee to inquire and report on the power of Congress to secure uninterrupted transit and safety of travellers on railroads.[3] Neither resolution brought forth a report.

These early proposals are evidently quite tentative. They evince doubt as to the constitutionality of the action sought, both in their wording and in the committee of reference.

But in 1873 a bill was introduced by Mr. King (Mo.) which shows no such doubt. It was merely referred to the House committee on commerce; but a speech by Mr. King was printed in the *Globe*[4] which is, perhaps, the most interesting and important

[1] *Cong. Globe*, 1867-68, p. 2307.
[2] Feb. 15. Introduced by Sumner (Mass.).
[3] *Cong. Globe*, 1871-72, p. 1160. Acker (Pa.).
[4] 1872-73, append., p. 33.

matter bearing on the subject to be found in congressional material.

Briefly, the bill provided that all passenger cars should be equipped with a power-brake to be operated from the locomotive. For violation heavy fines were imposed and the carrier made liable to double damages. All railways were to make an annual report setting forth statistics of passenger traffic, accidents, etc.

Mr. King recounted the horrors of various wrecks and asserted that one-third of such accidents ought to be prevented by an efficient power-brake. He referred to signals, car construction, heating and lighting, the third annual report of the Massachusetts railway commission being referred to, but centered attention upon the brake. Data were presented which showed considerable progress in invention and application of brakes operated by springs, steam, air, electricity, and water.

He held that the protection of life and person was a paramount duty of Congress. It could not be left to the states: some were in control of the railways, while in none was the remedy adequate. Congress had not left it to the states to require that steamboats have life-saving apparatus, and there was no reason for doing so in the case of steam railways.

The next bill introduced is typical of a certain group of thinkers. It proposed to revise the law concerning the right of action in case of death due to the carrier's negligence, the idea being to make the common-law remedy more adequate. This conservative method of progress was also proposed as a remedy for all interstate commerce ills.

Then there were bills to regulate the transportation of explosives and dangerous materials; to abolish the use of stoves in passenger cars (1877); and to establish a commission to examine into the causes of railway accidents (1877). This last bill was drafted by no less a person than Charles Francis Adams, who himself remarked concerning it, "This is simply a seed. If anything comes of it, it can be easily developed in any way which practical experience shall show to be necessary or expedient."

In 1876, and again in 1878, James A. Garfield introduced a

bill "for the more thorough investigation of accidents on railroads."[5] It was simply referred to the committee on railroads and canals and nothing further done.

A few other bills bearing on the safety of passengers were introduced between 1878 and 1882; but enough has been written to clearly show the character of the movement down to the latter date. The years 1866–1882 constitute a well-defined period during which resolutions and bills for the most part suggested the expediency of or proposed investigation concerning accidents on railways. The interests of passengers dominated and hence the passenger train alone was considered. The mail service was mentioned also.

During this period self interest and public censure led the railways to rapidly introduce the train-brake in their passenger service, and by the year 1887 legislation on this point was hardly necessary. In the freight service this was not true, there being only some 24,000 freight cars equipped with such brakes in 1885. In this year the government railway engineers reported that while many railways had made a beginning in the use of automatic couplers upon freight cars they had not been applied to any great extent.[6]

Protection of Employees: 1882–87

Accordingly, in 1882, begins agitation for regulation of a somewhat different character. In that year Senator George (Miss.) introduced a bill to protect employees and servants engaged in foreign and interstate commerce, which bill was referred to a committee on education and labor.[7] It is significant as the first proposition to regulate railways in the interest of the safety of railway employees found in congressional records. From this time on, however, such bills became frequent.

The fact is easily accounted for in the growing power of labor organizations. The National Labor Union declined after 1870, but in 1878 the national body of the Knights of Labor was formed and in 1881 it cast off the guise of secrecy. This body

[5] *H. J.*, 1877–78, p. 468; 1876–77, p. 345.
[6] *H. Exec. Doc.*, 1885–86, **11**: 650.
[7] *Cong. Rec.*, 1881–82, pp. 471, 1578.

agitated for a study of labor conditions and partly as a result of its efforts the National Labor Bureau was established. About 1880 the extended use of the strike began, indicating a militant trade unionism, and in 1887 there came the American Federation.

Again, the fact that of the total number killed, railway employees had come to furnish about 40 per cent. and of the injured over three-fourths,[8] could not but have its effect. And the lack of proper brakes and couplers on freight cars made the explanation easy.

Most of the labor bills were similar in object to that originally introduced by Mr. George. In 1884, however, came the first proposition to limit the hours of railway operatives, a bill to prevent their employment for over twelve consecutive hours in each twenty-four being introduced by Mr. Wood (Ind.).[9]

Such legislation was to be passed later, but this bill got no further than a reference to the House committee on labor. It is of significance as the first attempt to remedy railway accidents by reducing the strain upon employees.

Naturally those bills which took the employee aspect emphasized the freight service, laying most stress upon the coupling problem. Such a measure, for example, was the resolution introduced in 1888 by Mr. Hatch (Mo.), instructing the newly established Interstate Commerce Commission to consider and report as to the "prevention of accidents in coupling and uncoupling cars and the use of brakes."

Mail Clerks and Mail Service

As early as 1867 there was a bill to punish the obstruction of railways used for the transportation of the mails.[10]

The post-office cars used in the railway mail service were more substantially constructed than the ordinary passenger coach, and from time to time Congress provided for the proper heating and lighting of such cars.

[8] *Annual Report*, I. C. C., 1888.
[9] *Cong. Rec.*, 1883–84, p. 729.
[10] *E. g., Statutes at Large*, **17**: 559. (1873.)

In 1881 the post-office appropriation bill made railways liable to a reduction of 10 per cent. in their compensation for failure to provide suitable safety heaters and safety lamps for post-office cars with such saws and axes for use in case of accident as the post office department should require.[11]

The close connection between the safety of passengers and a prompt and sure delivery of the mails is apparent. Two bills introduced in 1886, for instance, were: a bill to protect life and property and to prevent accidents and delaying of mails (*H. R.* 4900); a bill to promote safer and quicker transportation of passengers and mails (*H. R.* 9272).

In a word, the government's interest in the safety of its employees in the mail service and its desire for the efficiency of that service both worked for government regulation in the interest of general safety.

[11] *Ibid.*, **21**: 375.

CHAPTER XXV

CONCLUSION

I. Chronological Summary by Decades

The factors which make it logical to begin a new period, and a new volume, with the year 1850,[1] do not at once find much expression in congressional action. In fact, the first ten years of the second half of the century differ relatively little from the preceding decade. They are characterized by debates on Pacific railways, duties on railway iron, the mail service, and land grants. There was not much action, save that in the shape of donations of land, and as yet the aid aspect of the government's relationship to railways dominated.

During the next decade, the second of the period, the fruit of the preceding economic developments appears in legislation along many lines. In addition to the subjects just mentioned, government construction, federal taxation, and regulation of commerce among the several states, appear as the characteristic matters dealt with. This is the epoch of war and the consummation of the Pacific railway idea. The regulation aspect becomes prominent if not dominant, and toward the end of the decade the Granger movement takes its rise.

As in earlier years there was friction in the mail service which led to some regulation.

The war and the establishment of the nation were attended by an outburst of nationalism. The chief railway legislation consisted of acts giving the president power to seize and operate railways, to facilitate interstate commerce, to forbid territories to incorporate, and to establish various Pacific railways, incor-

[1] See above, vol. I, p. 10.

porating and aiding by subsidies and land grants. Immediately following the Civil War came the period of greatest activity. Inflation was attended by revived railway construction. In the field of technics came the air-brake, the sleeping car, and steel construction of tires and rails. Organization was marked by the rapid breaking down of differences in gauge and the like, with a corresponding increase in co-operation and through transportation. It was in the spirit of the age, then, that Congress pushed railways across the Rockies to the Pacific and took steps to break down state barriers to interstate commerce.

Between 1870 and 1880 came notable developments in the relations between railways and Congress. For one thing the mere change in the number of railway bills is significant: the volume of railway measures increases tremendously. The qualitative change is little less marked. Rights of way and extensions of time were granted; but forfeiture of land grants, protection of settlers, mail service regulation, reasonable rates, regulation of interstate commerce—notably livestock,—are the questions dealt with. In 1869 the revulsion against the Pacific railway policy came,[2] and at about the same time began the movement to forfeit land grants. In 1872 an act regulating railway mail service was passed,[3] and in 1876 it was enacted that land-grant roads should receive but 80 per cent. of regular rates. In 1873 a bill regulating livestock traffic became a law.[4] The McCrary bill passed the House in 1874, and the Reagan bill in 1878.[5] In the latter year came the Thurman Act; and the position of auditor of railroad accounts was created.[6]

It is almost enough to call attention to the fact that the Granger movement reached its height in the 1870–1880 decade. One object, however, of the chapter on "Congress and the Granger Movement"[7] was to emphasize the national aspect of this movement—an aspect too often overlooked. As one looks back at the decade two problems seem to overshadow all others:

[2] Above, p. 81 f.
[3] *Ibid.*, p. 205.
[4] *Ibid.*, p. 262 f.
[5] *Ibid.*, p. 288.
[6] *Ibid.*, p. 105.
[7] *Ibid.*, p. 259.

the administration of the various Pacific railway acts, and the rate problem of the Grangers and allied interests.

The years 1880–1887 lead up to the Interstate Commerce Act. In addition to the kinds of measures already noted the following subjects appear: consolidation, discrimination, a commission to investigate. The movement to forfeit land grants reaches its height about 1884. The safety of railway employees becomes an issue. Beside the Interstate Commerce Act, the more important railway laws passed during the last seven years of the period were for the adjustment of land grants, for an investigation and report on the Pacific railways, for establishing a bridge in conflict with state laws,[8] and regulating railways in Indian Territory.[9]

Clearly there have been three marked periods of maximum railway legislation: 1865, 1873, 1887. These periods correspond closely to the Civil War, the Granger agitation, and the discrimination and mismanagement of the later Seventies and early Eighties.

II. Regulation Development

If all railway relations of the government be embraced under regulation and aid, the proportions of these categories are interesting. Roughly they might be outlined as follows:

1850–60: *Aid* predominant; the mail service regulated.

1860–70: *Aid*, with considerable regulation, largely negative in character.

1870–80: *Regulation* decidedly dominant; but not comprehensive. State activity.

1880–87: *Regulation*—a comprehensive system worked out. *Aid forfeited.*

The period taken as a whole may be regarded as transitional. During its thirty odd years the railway problem ceased to be one of aid and became one of regulation.

This transition was the result of change in economic and technical conditions. Down through 1850 there was great need of more transportation facilities to supply a rapidly expanding na-

[8] Above, p. 236.
[9] Above, p. 190.

tion. This spelled aid,—positive and negative, subsidies and freedom from restriction. And the leap to the Pacific prolonged this aspect and intensified the struggle for regulation. Soon after the negative regulation which followed the war, the growth of railway abuses became so great that the demand for positive, general restriction gathered rapidly increasing weight.[10] For one thing the construction of the railways which was so eagerly desired and so bounteously encouraged begot a great and growing population which depended upon the railway. This was the inland people of the West. Having invoked the genii there arose a clash of interests and the question arose as to which should dominate, the railways or the broader group known as the public.

In discussing such federal regulation as existed within the first half of the nineteenth century six bases for it were distinguished: the District of Columbia, territories, public lands, mail service, public defense, and aid given as an investment. Economic developments brought other bases in the next period, the growing complexity of the service making new points of contact. In the first place there is the regulation of bridges, which came with the spanning of the great navigable waters of the West. Then there is the regulation of the livestock service which was enacted in 1873. And finally, the conclusive realization of the application of the commerce clause in 1887. Not till the second period was well advanced was it generally conceded that railway operations fell within the scope of the interstate "commerce" of the constitution. It is to be observed that not until this was conceded could there be, under the constitution, any broad general regulation of railway transportation; while, once granted, the door was open for the regulation of such transportation to the extent that it is in the interest of the nation.

[10] As late as 1855 a committee on public lands could report that "the charge that railroad companies are likely to become dangerous monopolies is not borne out by facts in this country," stating that railways were not profitable to the stockholders and hence could not become dangerous political machines. (*Rep. of Comm.*, 1855–56, no. 324.) But in 1870 such a report could hardly have been made. The words of John B. Hay are typical: "I tell you there is no problem that so pressingly calls for a solution as the one how the corporate monopolies of this country are to be controlled, and none awakens profounder apprehensions in the minds of the people as to the result." (*Globe*, 1870–71, p. 122.)

The rise of a tendency to regulate in the interest of safety, first of passengers, then of employees, is also noteworthy.

The way for the Interstate Commerce Act was prepared by many acts of particular regulation. For example, there was a long-and-short-haul clause in the District of Columbia; discriminations were dealt with in the case of bridges, the Pacific railways, and elsewhere; accounts and reports also required attention from time to time. In short, fragmentary regulation came before the general. The importance of the Pacific railways as a field for experiment is not easily over-emphasized.

As finally passed the act of 1887 was entirely satisfactory to no one. It was the result of the compromise of widely divergent views: the House standing for a common-law remedy, prohibition of pooling, and a rigid long-and-short-haul clause; the Senate, for a commission, toleration of pooling, and flexible long-and-short-haul regulation. There was also difference of opinion concerning the inclusion of the passenger service and water ways. Thus the act contained discordant elements, notably the anti-pooling section. It was generally regarded as experimental.

III. The Evolution of the Aid Policy

The outline of regulation given above suggests the evolution of the aid granted railways by Congress. All through the first half of the century the dominant attitude of Congress toward railways was one of giving assistance to, or at least investment in, a means of internal improvement. There is clear reason to believe that had the railway come a little earlier direct subsidies would have been given and government lines have been constructed. Largely on account of political developments—not, apparently, on direct economic grounds—this became impossible; and railways were as a rule constructed by private companies aided by federal government, states, counties, and municipalities. On the part of the nation, down to 1850, aid was given as follows:

Surveys.

Remission of duties on iron.

Land grants:

(a) Rights of way.

(b) Proceeds of land sales.

Propositions for aid through general internal improvement funds, special stock subscription or gifts of money, and in connection with the mail service were made, but failed.

Before the close of the first period aid through government surveys and the remission of duties on imports of railway iron ceased, and the same may be said of donations of the proceeds of land sales. But in 1850 began the epoch of great land grants and millions of acres of the public domain were given to encourage railways. Also, certain Pacific roads were aided by large subsidies in government bonds, though the principal of these subsidies, together with interest, was to be repaid. The second period of aid closed by 1870, approximately.

It will be observed that after 1850 almost no aid was given in the form which government aid took before that year; also, that no aid granted prior to 1850 took the form of the principal later assistance. Thus, in form, the aid aspect of the two periods differs. The surveys made by the government for Pacific railways make a possible exception.

As the second period wore on and the social side of railway property and service came to be more and more apparent the tendency to regulate grew stronger. The increasing importance of the service, its vitally essential character, coupled with the spread of abuses caused this tendency. It is noteworthy that this tendency was not carried out as soon or as thoroughly as might have been expected, and a point already made[11] is to be emphasized, namely, freedom from regulation may be regarded as a form of aid. The nation needed railways, and, indeed, capital in many forms. Hence corporations were encouraged, perhaps not consciously, through lax charters, light taxes, etc., as well as by grants. Then, following the abandonment and even forfeiture of positive aid, this negative aid began to decline. Herein lies no small part of the corporation and railway problems of today.

[11] Above, p. 8.

IV. Has Congress a Memory?

One question which arises and to which our material suggests some answer is, has Congress a memory? The question has important bearing upon the efficiency, not alone of railway regulation, but of our entire system of government. In order to profit by experience and pursue a connected policy there must be a certain continuity in action which involves what may be called a group memory. Does a study of the Congressional history of railways show Congress to have such a faculty? The multitude of bills introduced and the many acts passed upon numerous different subjects obviously makes this difficult, especially for a constantly changing body. Yet, on the whole, a considerable degree of it is shown. The committee is its most effective seat. In committee reports are found more or less accurate and complete resumés of the history of the subject in hand. The thoughtful senator or representative who had served several terms sometimes became the prompter of Congress' memory. Moreover, the printed proceedings of Congress are available in the *Globe* and *Record*, and in not a few cases the past was called up through this medium—often for political attack, however. Notable instances of direct profit by experience are found in the insertion of clauses reserving the right to alter, amend, or repeal bridge and other laws[12] and in the Pacific railway charters.[13]

On the other hand, evidences of lapses of congressional memory are found. It became doubtful whether Congress intended to require annual payment of interest on the Pacific railway bond subsidies.[14] A few years after its passage congressmen did not know of the existence of an act allowing territorial incorporation. Committee reports sometimes overlook past events; and the bulky records are often not consulted.

In this connection the courts should be mentioned. In the interpretation of many acts the intent of Congress is the crucial point. Here the court does the effective remembering, and in

[12] Above, p. 233.
[13] Above, p. 123, 152.
[14] Above, p. 85 f.

some cases its interpretation is doubtful.[15] The memory of Congress may thus be practically perverted.

On larger lines one rather feels that, with the possible exception of party matters, there has not been sufficient appreciation of the evolution of things. Had Congress possessed a knowledge of the scope of regulatory acts and discussions prior to the act of 1887 it might have acted with more assurance and effectiveness. When it was remarked above that fragmentary regulation prepared the way for the general, no close connection between the two was meant. Congressmen did not—perhaps could not—bring together, analyze, and synthetize all action pertaining to the subject.

It is believed that Congress has worked with fair consistency in the railway field; simply history shows that there is danger of forgetting, of losing the light of the past, and it should be the duty of congressmen to familiarize themselves with the earlier developments in the more important lines of legislation with which they are dealing. This is surely essential to the most efficient legislation, and here lies a practical reason for a congressional history of railways.

[15] Above, e. g., p. 36.

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THE MOST-FAVORED-NATION CLAUSE IN COMMERCIAL TREATIES

ITS FUNCTION IN THEORY AND IN PRACTICE AND ITS RELATION TO TARIFF POLICIES

BY

STANLEY KUHL HORNBECK, A. B.

Instructor in Political Science, University of Wisconsin

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THE MOST-FAVORED-NATION CLAUSE IN COMMERCIAL TREATIES

INTRODUCTION

The phrase "most-favored-nation" first appeared in commercial treaties toward the close of the seventeenth century. The clause in which it was used had been invented earlier in the century to meet the exigencies of that great commercial expansion which had followed upon the restless activities of the fifteenth and sixteenth centuries. The growth of international trade in the eighteenth century called for the multiplication of commercial treaties, and with the treaties the necessity for using the new clause increased.

After the American revolution, a series of treaties was made in which the clause was given an expanded and modified form. Henceforth there appear both the unqualified and the qualified forms. During the nineteenth century, while international trade became world commerce, commercial treaties became so common that they now bind the trading nations as in a fine-meshed web. In these treaties the clause of the most-favored-nation was inserted with so few exceptions as to warrant its characterization as the "corner-stone of all modern commercial treaties."

Rarely does a conditional provision so extensively used and so vital in its bearing upon economic relations escape misinterpretation and avoid becoming the source of misunderstanding. The experience of this clause has been no exception to the rule.[1] All

[1] "Wohl keine Institution der internationalen Handelspolitik hat in neuerer Zeit so viel Anfechtung erfahren wie die Meistbegünstigung." Grunzel: System der Handelspolitik, 475.

through the diplomatic correspondence of the last century there appear constant disagreements and ever-recurring irritation over what is the meaning and what are the obligations attaching to this or that clause. In view of these facts it is somewhat surprising that only recently has the clause been made the subject of special study. True, each of the more important treatises upon international law and many works upon international commerce have given it notice, while numerous articles have dealt with it briefly. The diplomatic correspondence which it has occasioned would fill many volumes. Wharton's Digest of International Law (1887) and Moore's Digest (1906) contain excellent summaries of some of this. But no monographic study appeared until the work of Mr. Herod, which was published in 1901.

The changes in world politics which ushered in the twentieth century have vastly increased the general interest in questions which affect international, and more especially commercial, relations. This widening of the political horizon has already borne fruit in the relatively immense crop of monographs which has appeared within the last decade. In this new consideration of living problems the most-favored-nation clause has begun to receive some of the attention which its importance merits. A consistent effort is being made to arrive at a common agreement as to its interpretation in existing treaties, and to so construct future treaties that there will be no room henceforth for misunderstanding.

Mr. Herod's "Most-favored-Nation Treatment" discusses the clause in general but with reference especially to the historical and legal basis for American practice. In 1902 M. Visser produced an article which furnishes a careful résumé of the history of the clause and a discussion of the chief points in the controversies to which it has given rise. Since then several German writers, especially Calwer, Kaufmann, Glier, and Schippel, have devoted very considerable attention to numerous phases of the subject. Dr. Glier's work represents an elaborate study of commercial treaties. It accomplishes very effectively the task which the author set himself—the clearing away of a mass of false impressions concerning the commercial obligations of the

United States and Germany, and Germany and Argentina. It is invaluable, also, as an index and guide. A serious study of the history and legal aspects of the clause appears in Sig. Cavaretta's book. Certain South American writers have recently contributed to the discussion. However, with the exception of Mr. Herod's book, no concise treatment has appeared in English.

For the sake of convenience and economy of space, the full titles of books will not be given in the footnotes, but only in the bibliography appended to this study; except in cases where a book or article is cited but once.

CHAPTER I

COMMERCIAL TREATIES: THE ORIGIN, INTRODUCTION, AND GENERAL ACCEPTANCE OF THE MOST-FAVORED-NATION CLAUSE

The articles contained in commercial treaties have been conveniently classified by De Martens as falling into three categories:

1. Those relating to the subjects or citizens of the contracting powers in regard to their civil rights;
2. Those relating to rights reciprocally granted to the subjects in all that concerns navigation;
3. Those which concern commerce properly speaking.[1]

As the most-favored-nation clause is an instrument for generalizing concessions and for furthering and insuring international commercial equality, it is to be expected that it will be found in a very large proportion of existing commercial treaties, and that it will be employed in connection with stipulations of each of these classes.

Commercial treaties cover, of course, a wide variety of subjects. They include importation, exportation, transit, transfer, and warehousing of merchandise; customs, tariffs, navigation laws; quarantines; tolls upon water courses and canals; the stay of boats in roadsteads and docks, and the deposit of merchandise in customs warehouses; coasting trade; the admission of consuls and their rights; stipulations which govern the respective subjects of the contracting powers in the possession and transmission of personal and real property; payment and exemption from extraordinary levies and forced loans; service

[1] De Martens: Droit international, II, 314-315.

in the army and militia; conditions of citizenship; establishment of consuls, etc., etc.[2]

While the most-favored-nation clause is used to cover and supplement agreements upon each and every one of these subjects,[3] it is the purpose of the present study to consider it with special reference to its occurrence in articles regulating commerce and navigation.

Every state has a two-fold object in its international politico-commercial arrangements: to gain and to preserve the greatest possible advantages, and to guard against present or future disadvantages and discriminations. In making treaties with this object in view, the clause of the most-favored-nation has been found one of the most convenient and effective instruments, especially for the attainment of the latter end. In substance, the clause deals with the treatment which citizens or subjects of each of the contracting powers shall receive in the territories and at the hands of the other, especially in matters of navigation and commerce. Favors in navigation and commerce extend to the articles, the agents, and the instruments of commerce. The object sought is uniform treatment without discrimination.[4]

[2] Calvo: Droit international, III, 1597.

For an excellent discussion of the contents of commercial treaties, see Grunzel: System der Handelspolitik, 447-462. See, also, Von Melle, *op. cit.*, 210. *(For works cited in footnotes see bibliography,* p. 113 ff.*)*

[3] As examples: The treaty between Greece and Japan, May 20-June 1, 1899, stipulates for reciprocal most-favored-nation treatment as regards, (article 2) diplomatic and consular officers, (article 3) commerce, navigation, residence, hiring residences and warehouses, trading, all that concerns the acquisition, enjoyment and disposition of property of all kinds, (article 4) travel, commerce, navigation, (article 5) export and import duties and prohibitions, transit, warehousing, bounties, drawbacks, (article 7) tonnage, light and harbor dues, pilotage, quarantine, salvage in case of damages, (article 13) billeting, compulsory military service, contributions of war, military exactions, and forced loans. The coasting-trade is excepted (article 8).

The treaty between China and Mexico, December 14, 1899, while a little less complete than the above, is nearly as comprehensive and includes also (article 9) ships of war; it also provides (article 11) that if either country shall open its coasting trade, wholly or in part, to any nation or nations, the other party shall have the right to claim the same concessions or favors, "provided said contracting party is willing, on its part, to grant reciprocity in all its claims on this point."

[4] "It is clearly evident that the object sought in all * * * is equality of international treatment, protection against the wilful preference of the commercial interests of one nation over another."—Mr. Sherman's note to Mr. Buchanan, Jan. 11, 1898. Moore, *op. cit.*, V, 278.

In the simplest form of the most-favored-nation clause the contracting parties agree that in all that respects commerce and navigation, any privilege, favor, or immunity which either grants to a third state shall be granted to the other.

The surest way to arrive at an understanding of the position of the clause in modern treaties is to go to its origin and to trace it in its evolution, that is, to study it historically. Two conclusions must inevitably be drawn from such a course. To state these in advance will greatly simplify the demonstration. In the first place, the clause had a two-fold origin, and usually the two-fold object suggested above—it was at once a political and an economic instrument. In the second place, two leading schools of interpretation have grown up, the one demanding a strict, or literal, interpretation of the words of the clause, the other insisting upon a practical and more political interpretation. Of the leading exponents of these radically different interpretations, the nation which holds to the former, Great Britain, is at the same time the greatest exponent of the principles of free trade; while the nation which insists upon the latter, the United States, is the foremost advocate of the theory and practice of protection.

The commercial idealism which swept over Europe in the middle of the nineteenth century emphasized the theory and practice of unconditional most-favored-nation treatment, and this practice has gained the general adherence of European states. The United States on the other hand has continued to practice a "qualified" extension of favors, on the basis of tangible reciprocity.[5]

Most writers on international law, inferring from the fact that in its practical development the clause of the most-favored-nation has been most frequently applied as a regulator of commercial relations, affirm that it owes its origin to a movement eminently economic. Sig. Cavaretta points out, however, that in its first appearance, it was due to political rather than economic exigencies, although these were of course closely allied

[5] "Reciprocity" is to be carefully distinguished from "retorsion" and "retaliation." It is a business principle, practicable and equitable, recognizing the fundamental fact that in international commerce as in private business, exchanges are made upon a basis of "equivalents."

with elements of an economic character. He discovers the embryo of the clause in the treaty of November 8, 1226, in which the Emperor Frederick II conceded to the city of Marseilles the privileges previously granted to the citizens of Pisa and of Genoa. These concessions were dictated by political motives.[6]

Although the practice of granting reciprocal favors and the theory of favored nations had existed much earlier than this treaty, and although this example was followed with modifications during succeeding centuries, it is not until the seventeenth century that the real clause of "the most-favored-nation" makes its appearance in written treaties.[7]

Previous to this time the number of nations engaged in international commerce, as regulated by treaties, was small. Trade was really carried on by the adventurous few, and was, as a rule, either sporadic or governed by monopolies. As world commerce increased in the fifteenth and sixteenth centuries, as England and Holland set themselves to compete with Spain and Portugal, and the French and Scandinavians commenced to dispute the supremacy of the Hanseatic League and the waning power of the Italian Republics, conditions were changed.

From the beginning of the seventeenth century, international trade increased by leaps and bounds. The political machinery was not far behind the economic. Each state wished to have a guarantee of the greatest possible advantages for its commerce and industry, and, in return for the advantages which it gained, it had to give concessions. In order to establish the guarantees, treaties became necessary and frequent. In order to avoid repetition, a clause was framed which should refer back, embrace the conditions of the treaties already existing, and extend their provisions to the newly contracting states. This clause was that of the "most-favored-nation."

Not only did this clause generalize previous provisions; it per-

[6] Cavaretta, *op. cit.*, 59.

[7] For a detailed study of analogies to the clause in early times, see Cavaretta, *op. cit.*, 12-61.

In a treaty between England and certain cities of Flanders and Brabant, Aug. 4, 1446, appeared this provision: "Item: que les marchands d'Angleterre * * * seront traités aussi doucement et gracieusement comme les autres nations fréquentant ces pays et villes."

formed a more important function, namely, to safeguard the state in whose treaties it appeared against future discriminations. This made it at once of great importance. Thus M. Visser finds the principal cause for its extensive use in the economic necessity which forced each state, in the clash of international commercial competition, to guard against falling into a position of disadvantage.[8]

In the beginning, this extension of favors was made but to one or two specified states. For instance, in the agreement, July 6, 1612, between the United Provinces and the Porte, the former secured the same advantages which had already been granted to Great Britain and France. The next step was to extend the advantages to include such favors as should be granted to certain other specified nations; then to include advantages granted *to any nation whatsoever*. Thus article 4 of the treaty between Great Britain and Portugal, January 29, 1642, specifies that subjects of Great Britain shall enjoy all the immunities accorded the "subjects of any nation whatsoever in league with the Portugals." This treaty is regarded as marking a turning point in the economic and political relations of the two countries.

A treaty between Great Britain and Sweden, April 11, 1654, stipulated for the enjoyment by the citizens of each country in the realms of the other of the same privileges "as any other foreigner at present doth, or hereafter shall enjoy there." In 1659, in the treaty between France and Spain it was guaranteed that the subjects of each sovereign while in the realms of the other "seront traités comme la nation la plus favorisée, ne payant que les mêmes droits auxquels les Anglais et les Hollandais sont soumis". The treaty of February 13, 1661, between Great Britain and Denmark contains the words, in article XI, "people of any foreign nation whatsoever." The Anglo-Danish treaty of November 29, 1669, contained the phrase "whatsoever foreign nations". A treaty in September, 1675, between Great Britain and the Porte used the formula "whatsoever other Christian nation" (article III); while that of August 16, 1692,

[8] Visser, *op. cit.*, 78. Cf. Glier, *op. cit.*, *passim*.

between Denmark and the Hanse cities, contains the phrase "most-favored nation" (article VI).[9]

In the eighteenth century, the treaty of commerce assumed greater importance, and with it the importance and the frequency of appearance of the clause increased. Not, however, until toward the end of the century did commercial treaties begin to assume the frequency which characterized their appearance during the nineteenth century. In the transition from the old exclusive system, one of the first steps was the recognition of the principle of free commercial intercourse. Not until states had gotten away from the mercantile theory, not until men's minds were disabused of the idea that the profit of one state meant loss to another, that in a commercial transaction only one party gains, was an extended world commerce possible. Once this conception disappeared, the régime of monopoly and of the mercantile system gave place to extensive reciprocal commercial arrangements between nations, and the rapid opening of world commerce. The most-favored-nation clause appeared in treaties of the eighteenth century more often than has been imagined. Even so authoritative a writer as Grunzel has underestimated the importance which it had assumed. The idea of a "qualified" or "conditional" form had not yet originated, but the clause occurred in the known, unconditional form in so many treaties that Dr. Glier feels warranted in characterizing the eighteenth century as that of unconditional most-favored-nation treatment.[10]

The success of the American revolution was of the greatest importance in all that relates to commerce. Soon after the signing of the Declaration of Independence the United States began

[9] *Cf.* Treaties between Portugal and the United Provinces, Aug. 6, 1661; and Great Britain and Sweden, July 17, 1656, and Oct. 21, 1661.

Early commercial treaties were limited largely to provisions concerning the commerce between the contracting parties. As the most-favored-nation provision entered, and as the treaty circle widened, it became customary to add a guarantee for equal treatment of subjects. A further provision guaranteeing religious freedom to foreigners also became common, a provision which came to have a very substantial value in certain countries.

[10] For examples see the following treaties: England-Portugal, Dec. 27, 1703; England-Spain, Dec. 9, 1713; England-Spain, Dec. 14, 1715; England-Spain, Oct. 5, 1750; England-Sweden, Feb. 5, 1766; Prussia-Saxony, June 18, 1766; England-Russia, June 20, 1766; Portugal-Denmark, Sept. 26, 1766.

making treaties with European nations. In nearly all the treaties which were then and subsequently made by the United States, the clause of the most-favored-nation was inserted, but in a form which, then for the first time, specified that the advantages to be accorded were to be in return for an *equivalent*. The treaty with France, February 6, 1778, the first which the United States made, contained the first example of this new development. Here, in article II,

> The Most Christian King and the United States engage mutually not to grant any particular favor to other nations in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same favor, *freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.*[11]

Treaties with Sweden, April 3, 1793, and Prussia, September 10, 1785, contain similar stipulations. With the making of these treaties, there begins the development of the so-called "American interpretation."

Up to this time there had been no expression of the "conditional" principle. Americans originated and established the formal insertion of the stipulation that special favors must be specifically bought, that the most-favored-nation clause would not serve to give one nation without compensation an advantage for which another had paid, that is, that it would not generalize concessions.

From this time the clause existed, and has been used, in two forms. The United States at once made treaties with a number of European powers, regularly using the conditional form of the clause. The states of Europe, continuing for a time to use the conditional form among themselves, used the other form in their treaties with the United States, and gradually adopted the principle of compensations which underlay the American policy. While the United States has persisted throughout to the present time in the use of the one form, the alternative practice appears in European treaties through a

[11] In the making of this treaty, it is interesting to note, France was considering her political even more than her economic interests.

long period up to 1860, after which an entirely new direction was taken. These various phases will be enlarged upon as our discussion advances.

By the end of the 18th century the principle that commercial intercourse should not be prohibited or unduly hampered had been generally, but by no means universally recognized among the leading Western nations. Neither the American Revolution nor the inauguration of a new era after the Napoleonic wars served to do away entirely with the old restrictions. The Americans stood from the first for a perfect "equality" of treatment in matters of trade and navigation, but the idea of national monopoly clung in the minds of certain European statesmen of the old school and the last vestiges of it were not cleared away until the middle of the nineteenth century.

However, with the beginning of the century the number of commercial treaties increased enormously. The most-favored-nation clause became a regular part, and its function in regulating the multiplex counter-rights of the subjects of treaty-bound states increased in due proportion to the number of treaties. The insertion of the clause came to be looked upon almost as a matter of course. Schmoller has characterized the clause as the "völkerrechtliche Eckpfeiler aller neueren Handelsverträge." The clause was regularly inserted in the treaties of the Zollverein. It was used throughout the series of treaties fashioned under the new commercial policy of Napoleon III. Since 1860 it has occurred almost invariably. It forms the basis of the present commercial relations of France and Germany. It appears in most of the commercial treaties of the United States and Great Britain. It is prevalent in that large group of European treaties which were made in the last ten years of the century. The new German treaties contain it without exception, in absolute form. France holds to it as far as possible in spite of her adoption of the double tariff.[12]

Spain having developed an elaborate commercial policy, meant to rid herself of the cramping restrictions of the clause, but in practice she succeeded only to a very limited extent in

[12] *Cf.* Visser, *op. cit.*, 72–74.

effecting this exclusion. Portugal, with a similar policy, has succeeded in making only a few treaties without the clause. Switzerland for some time opposed the clause, but has continued to use it. It occurs in the majority of the new Japanese treaties, and in recent Chinese treaties, having in several of these a very wide extension. In some South and Central American states an agitation against the clause was begun on account of embarrassment caused by the conditional form. A few of these states denounced their commercial treaties with European countries, thinking these treaties an obstacle to their project of forming a customs-union, but in their treaties which remain in force the most-favored-nation clause is found regularly. We may conclude that as commercial treaties exist today they generally contain this clause in some form, and that attempts to get rid of it have not been very successful.[13]

A new phase in the history of the clause began with the rise of the double-tariff systems. The "maximum-and-minimum" system invented in Spain was adopted by the French with the affirmed object of freeing the legislature from the checks imposed by the régime of treaties of commerce. Spain, France, Russia, Brazil, Greece, and Norway adopted this system wholly or in part. The Germans developed the "general-and-conventional" system which has been extensively imitated and is meeting with constantly increasing favor. The preferential-tariff movement is giving us a double-tariff in still another form. The effect of these developments upon the clause of the most-favored-nation will occupy our attention in a subsequent chapter.

[13] "On peut donc dire que les traités de commerce se basent en général sur le traitement de la nation la plus favorisée. Presque tous les traités contiennent une clause garantissant ce traitement d'une manière plus ou moins étendue, et le petit nombre d'états qui ont essayé de s'y soustraire n'y ont réussi que fort peu. Il s'entend que les exceptions faites en ce qui concerne le commerce frontière, les relations avec les états avoisinants ou la faculté de conclure une union douanière n'enfreignent pas le principe d'une manière importante. Ces réserves ne présentent que peu d'intérêt ou sont expliquées par les nécessités du voisinage." (Visser, *op. cit.*, 77.)

CHAPTER II

DEFINITIONS AND CLASSIFICATIONS

In order to simplify the study of the clause as it appears in many treaties, we may first consider the limitations within which it operates and the general forms in which it occurs. It is not intended that the clause shall operate so as to affect the internal policy of the state; it applies solely to treatment of foreign states, that is, to the relative treatment of the citizens and the commerce of foreign states. It is not usually considered as comprehending special arrangements and reciprocity between nations, where on account of proximity or special circumstances, reason exists for relations which cannot be shared by the world at large.[1] Special relations between a colony and the mother country are generally understood to be exempt from the operation of the clause.[2] The term "most-favored-nation" is sometimes replaced by "most-favored-foreign-nation," though even where not so specified, that meaning is understood, as the contracting parties do not mean, for the purpose of the clause, that reciprocal relations between themselves and their colonies shall be considered as standards for most-favored-nation treatment.

With these exceptions, the scope of the clause appears to be limited only by its wording and the interpretation put upon that wording. The clause sometimes stipulates that whatever advantages are accorded by either contracting party to a third state shall extend to the other; sometimes, that this shall be so

[1] *Cf.* Herod, *op. cit.*, 112–115; Visser, *op cit.*, 162; treaty between Great Britain and Uruguay, July 15, 1899; treaty between United States and Ecuador, June 13, 1839; treaty between Holland and Portugal, July 5, 1894.

Cf. cases cited *infra, passim.*

[2] "* * * bleiben gewöhnlich die wechselseitigen Begünstigungen im Handelsverkehr der Mutterländer mit ihren Kolonien ausserhalb des normalen Meistbegünstigungszwanges." Oncken: Handwörterbuch, IV, 1074.

without equivalent; sometimes it forbids putting obstacles to the commerce of one which are not extended to the commerce of other nations. In some clauses there exists a limitation including or excluding certain nations; again the advantages are specified or limited; sometimes the articles which are to enjoy special treatment are enumerated.

It is customary to limit the time of duration of a commercial treaty. Ten and twelve year periods are those most frequently prescribed in modern treaties, but numerous writers have suggested a shorter period of say five years. On the side of stability, there is much to favor the longer period, yet the rapidity with which economic conditions change makes a powerful argument for the increased flexibility which would be gained through the use of the shorter period.

The guarantee of mutual most-favored-nation treatment appears in a positive as well as in a negative form. In the positive form one or both of the contracting parties pledge that "every favor, every advantage, and every lowering of duties, which is or shall be granted a third party shall be granted to the other." In the negative form the guarantee is that "in none of the respects mentioned in the treaty shall third parties be treated more favorably than the co-contractants".

An analysis and arrangement of the forms in which the clause occurs leads to the following classification.[3]

Form 1. The *form of simple transfer,* which grants a privilege without reciprocity or condition. This often appears as a unilateral provision, especially in treaties between Christian or highly-civilized and non-Christian or semi-civilized states, whereby the favors are extended to the former without reciprocity. In this form,

One state grants to the other all the privileges granted to any other.[4]

[3] *Cf.* Classification by Herod, *op. cit.*, 5-7; Cavaretta, *op. cit.*, 8-9; and Glier, *op. cit.*, 229-232.

[4] Thus the capitulations and treaties of the Porte. Turkey has as a rule signed treaties for unilateral and absolute most-favored-nation treatment. In the treaty with Portugal, May 20, 1843, Article XII, there is an appearance of reciprocity on a conditional basis. In 1861 and 1862, France, Great Britain, Sweden-Norway, Denmark, Holland, Russia, the Zollverein, and the Hanse cities secured unilateral, unconditional, most-favored-nation pledges from Turkey.

Form 2. The *specialized reciprocal form*, which applies only to favors mentioned in the treaty. For instance:

No other or higher duties shall be imposed by either of the high contracting parties on the importation of any article, the growth, produce or manufacture of the other, than are or shall be payable on the like articles, being the growth, produce or manufacture of the most-favored-nation.[5]

Form 3. The *simple reciprocal form.*

The high contracting parties agree that, in all that concerns commerce and navigation, favors which either has granted or may hereafter grant to any other state shall be granted to the other party.

The United States-Turkish treaties of 1830 and 1862 are on the same basis. The United States has made other treaties on this non-reciprocal basis with Morocco, Siam, China, Muscat, Samoa, Egypt, and Zanzibar. For a long time China, Japan, and Siam were treated on this basis, and some of their treaties containing the clause in this form are still in force.

In the treaty between Japan and Great Britain, Oct. 14, 1854, article V provides: "In the ports of Japan either now open or which may hereafter be opened to the ships or subjects of any foreign nation, British ships and subjects shall be entitled to admission and to the enjoyment of an equality of advantages with those of the most-favored nation, always excepting the advantages accruing to the Dutch and Chinese from the existing relations with Japan." In the treaty between China and the United States, Oct. 8, 1903, article III provides that citizens of the United States in the open or hereafter to be opened ports of China "shall generally enjoy as to their persons and property all such rights, privileges, and immunities, as are or may hereafter be granted to the subjects or citizens of the nation the most favored in these respects."

[5] Treaty between China and United States, July 28, 1868, article 6, specifies for most-favored-nation privileges as regards *travel* and *residence*. In the treaty between France and Italy, Nov. 3, 1881, article XVII provides that each contracting party engages to allow the other to profit by any privilege or lowering of the tariff duties on the *importation* or *exportation* of articles, whether mentioned or not in the treaty, which one of them has accorded or shall accord to a third power, (the terms of the treaty not to apply to articles which are the objects of state monopoly). Treaties between France and Honduras, Feb. 11, 1902; France and the Dutch Colonies, Aug. 13, 1902; and France and Nicaragua, Jan. 27, 1902, provide for most-favored-nation treatment as regards duties on importation and exportation of specified articles. The form adopted in the treaty between Great Britain and Uruguay, July 15, 1899, specifically restricts the application. "The stipulations contained in the treaty * * * do not include cases in which the Government of * * * Uruguay may accord special favors, exemptions, and privileges to the citizens or the productions of the United States of Brazil, or of the Argentine Republic, or of Paraguay in matters of commerce. Such favors cannot be claimed in behalf of Great Britain on the ground of the most-favored-nation rights as long as they are not conceded to other states." This form is prevalent in recent treaties of South American states. See treaties between United States and Great Britain, Nov. 19, 1794, article XV; Holland and Spain, July 12, 1892, articles II, VI; Holland and Italy, Nov. 24, 1863, article II; Holland and Austria-Hungary, March 26, 1867, article II.

This includes the majority of British treaties.[6]

Form 4. The *imperative and unconditional form.*

The high contracting parties agree that all favors, etc., in all that concerns commerce and navigation which either has already granted or may hereafter grant to any other state, shall immediately and without condition become common to the other party.[7]

Form 5. The *qualified, or conditional, reciprocal form.*

The high contracting parties agree that in all that concerns navigation and commerce, favors which either has already granted or may hereafter grant to any other state shall become common to the other party *who shall enjoy the same freely if the concession is freely made, or upon allowing the same compensation if the concession was conditional.*

This is the form which appears in almost all of the treaties

[6] In the treaty between Great Britain and Servia, June 28-July 10, 1893, articles I, II provide: "The two contracting parties engage reciprocally not to accord to subjects of any other power in matters of navigation or commerce any privilege, favor, or immunity, whatever, without extending them during the duration of the said concessions to the commerce and navigation of the other party, and they will enjoy reciprocally all the privileges, immunities, and favors which have been or shall be conceded to any other nation." In that between Japan and China, July 21, 1896, article IV grants, "in all respects the same privileges and immunities as are now or may hereafter be granted to the subjects or citizens of the most-favored nation." A convention between Austria-Hungary and Mexico, Sept. 17, 1901, grants "Most-favored-nation treatment not only as regards importation, exportation, transit and in general everything relating to commercial operations and to navigation, but also carrying on of business and of manufactures and the payment of taxes in connection with them." *Cf.* Treaties between United States and Great Britain, July 3, 1815; Great Britain and Netherlands, Oct. 27, 1837, article I; Russia and Great Britain, Jan. 12, 1859, article X; France and Mexico, Nov. 27, 1886, article II; Germany and France, May 10, 1871, article XI; Servia and Greece, June 17, 1894; Roumania and Bulgaria, March 4, 1895; Belgian treaties with Denmark, Greece, and Sweden, 1895; and numerous treaties cited *infra.*

[7] The treaty between Germany and Austria-Hungary, Dec. 6, 1891, as amended and completed Jan. 25, 1905, provides that no more favorable conditions in respect of import, export, or transit duties shall be granted by either contracting party to a third power than shall be accorded to the other party, and that any concession of this kind made to the third power shall *at once* be applied to the other. Any dispute relating to these provisions to be referred to arbitration (article 23*a*). In the treaty between Great Britain and France, Feb. 28, 1882, it is provided that " * * * with the exception above stated, each * * * engages to give the other immediately and unconditionally the benefit of every favor, immunity, or privilege in matters of commerce or industry which has been or may be conceded by one * * * to any third nation, whatsoever, whether within or beyond Europe." *Cf.* Treaties between Great Britain and Italy, June 15, 1883, article XI; Russia and Denmark, Mar. 2, 1895, article I; and treaties cited, *infra.*

of the United States. It has, at one time or another, been used by almost all treaty making countries, but has been abandoned by European countries in favor of the unconditional. Japan uses it in most of her treaties, and it is used in the majority of the treaties of South and Central American states. The modifying or conditional clause "freely if—freely made," etc., contains the principle which the United States secretaries have consistently claimed shall govern the interpretation of the clause whether expressly stated or not.[8]

A distinction must be understood between the terms "qualified or unconditional" (bedingt), and "limited" (beschränkt). The former terms refer to the requirement for equivalents, the latter to time or territorial limitations. The term "absolute" implies that the clause is neither conditional nor limited.

[8] An especially good example occurs in the treaty between Greece and Austria-Hungary, March 4, 1835, which specifies that where a concession is given in return for certain advantages such concession shall be given to the other party to the treaty if a similar compensation is offered and as soon as this compensation or an equivalent is assured. But in either case a special convention must be made between the two parties to the treaty. In the treaty between the United States and Ecuador June 13, 1839, article XXXIV, "it is further agreed that the words 'most-favored-nation' * * * shall not be so construed as to prevent either of the contracting parties from concluding any treaty or convention with any other nation or state it may think proper as freely and as fully as though the said words were not used." * * * In the treaty between the United States and Japan, Nov. 22, 1894, article XIV provides: "The contracting parties agree that in all that concerns commerce and navigation, any privilege, favor, or immunity which either has actually granted or may hereafter grant to, * * * any other state, shall be extended to * * * the other high contracting party *gratuitously if the concession in favor of that other state shall have been gratuitous, and upon the same or equivalent conditions if the concession shall have been conditional; it being their intention,*" etc. *Cf.* treaties between Argentine Confederation and Prussia, Sept. 19, 1857, article III; and Argentine Confederation and Japan, Feb. 3, 1898, article IV. For a complete list of U. S. treaties containing this form, 1778–1887, see Herod, *op. cit.* 13, note. *Cf.* treaties: Portugal-Prussia, Feb. 20, 1844, article XII; England-Liberia, Nov. 21, 1848; Zollverein-Netherlands, Dec. 31, 1851, article XXXIII; Holland-Liberia, Dec. 30, 1862, article XI; North Germany-Liberia, Oct. 31, 1867, article VI; and recent Japanese treaties.

CHAPTER III

PRACTICE OF THE UNITED STATES: THE CONDITIONAL CLAUSE

When the United States entered the list of nations with the enthusiasm of a people newly independent, united, and thoroughly conscious of its economic and political tasks, one of its first steps was to invite relations of amity and free intercourse with the older nations, nations from which it needed so much and to whom it had much to give. We at once threw open our ports to all foreign nations and endeavored to secure in those countries the privileges enjoyed by their own and other subjects, offering reciprocal advantages. Our earliest agreements show a desire to give and to accord the most liberal terms to international trade, to avoid exclusive relations, and to base our commercial intercourse upon the principle of give and take. The central feature in our commercial policy from the first has been reciprocity, as a survey of our treaties will clearly indicate.

As has been pointed out, the special limiting clause which expresses the American idea in commercial treaty-making and forms the basis of American interpretation was first inserted in treaties of the United States. It was inserted in our very first treaty, and it has, with few exceptions,[1] appeared in all our treaties from that day to this. The limiting clause has been omitted in cases which we will mention, and one or two instances of irregular interpretation have occurred.

When our friendly proposals for commercial reciprocity were rejected by several nations, when we found foreign restrictions and discriminations operating against us, very soon after the ratification of the constitution, we threatened retaliation. Our

[1] See chapters IV and VIII.

economic situation was such that an extensive program of retaliation was inexpedient. Consequently we contented ourselves with imposing countervailing tonnage duties. Our object was three-fold, to force what we considered fair conditions of trade, to gain access to colonial markets, and to add to our own revenue. We were especially anxious also to give to our own merchants a monopoly of our carrying trade.

During the next twenty-five years our foreign relations exhibit a series of attempts which witness an urgent desire on the part of our government to secure a share in the lucrative trade of the colonies of several European countries, and to secure definite statements, in treaty form, of such privileges as foreign nations would allow us both in their colonial and in their home ports, rather than to leave these to the whims of legislation. Our commercial policy was then, and has been, except as we have especially favored our own merchants, uniformly in the support of equal terms to all nations. We have made it a practice not to grant special favors, unrequited to some nations to the exclusion of others. We have endeavored to grant and to secure equal opportunities in our commercial dealings with all nations.

Soon after the imposition of the tonnage duties an act was passed authorizing the President to suspend these duties in favor of any country which showed us similar consideration. France was the only important commercial nation which did not soon meet us on this proposition. At first reciprocity in navigation privileges was effected by legislation only. Great Britain preferred that the stipulation be incorporated in the treaty of commerce of 1815. The United States soon began the regular incorporation of this principle in treaties.

European students have characterized the tariff history of the United States as monotonous in the extreme. We have had no great struggle such as was waged in England for thirty years over the abolition of the Corn Laws; there has been no great turning point such as is marked in English tariff history by the Cobden treaty and in Germany by the Caprivi treaties; our tariff controversies have developed no great statesmen whose names and fame are connected with some single great commer-

cial issue. These facts serve to emphasize the general consistency of American tariff policy. With a few temporary lapses, after we had once inaugurated the protective-tariff system our commercial policy has been intimately associated with protective principles. As a result our treaties present a uniformity and a regular adherence to a given form, while the interpretation which our statesmen have put upon our agreements exhibits a unanimity which may be sought in vain in European practice.

Throughout this tariff history we see running an unbroken line of tariffs, almost all of them protective, in which a single-schedule tariff with fixed duties applies to imports from all countries alike. It has not been the policy of the United States to modify its tariff by treaties, creating thereby a two-column tariff. The double-tariff is a modern invention of European countries. But the United States has had some experience with the tariff-treaty in the form of reciprocity treaties. In these certain countries, for compensation, have been given, generally on account of unusual geographical position or political circumstances, reductions from the general tariff; but each time in return for a practical, tangible compensation.[2]

The history of our treaty-making begins with the French treaty of 1778. In article II of that treaty we find the promise that neither country will "grant any particular favor to other nations, in respect to commerce and navigation, which shall not immediately become common to the other party, * * * freely if the concession was freely made, or on allowing the same compensation, if the concession was conditional." In contrast with the guarantee of immediate, unconditional extension of favors to the co-contractor contained in the majority of modern European treaties, this clause expressly says that the second party shall enjoy the favor only in case it is freely ex-

[2] Previous to 1890, our tariff treaties were three in number, with Canada, with Hawaii, and with Mexico. (But this last was dropped four years after ratification because the legislation necessary for its operation had not been enacted.) After the McKinley Act of 1890, we made reciprocity agreements with six South and Central American countries, and with Germany, Great Britain, Austria-Hungary, and Spain, all of which were terminated when the tariff act of 1894 went into effect. Under the provisions of the tariff act of 1897 we have made reciprocity agreements with France, Portugal, Italy, Germany, Cuba, and Brazil.

tended to a third party, and that in case it is given for a *compensation* the second may not be excluded from it but may have the right to demand it "on allowing the same compensation." This makes the clause not an instrument of acquisition but a preventive against discrimination. It is this idea which has been written into nearly all of the series of American treaties and which the state department has always insisted regulates them. The treaties of the United States, examine them at such intervals as we may choose, give evidence of steady continuance in the same principle.

Our second commercial treaty was that made with Sweden, April 3, 1783, by whose second article it was agreed "not to grant hereafter any particular favor" [in navigation or commerce, to a third party] "which shall not immediately become common to the other party, who shall enjoy the same freely", etc. * * * "or on allowing the same compensation, if the concession was conditional." In articles III and IV it was agreed not to impose higher duties, etc., "than those which most-favored-nations are or shall be obliged to pay." Comparing this with the French treaty, we may conclude that no condition attaches to the most-favored-nation treatment *pro praeterito*, but that the treatment *pro futuro* is made conditional upon compensation, that is, the operation is, for the present to give each other treatment equal to that accorded any nation—for the future, to insure each against being discriminated against by the other.

A survey of our treaty-making up to 1816, shows that we concluded six commercial agreements—with France, Sweden, Prussia, Great Britain, Sweden-Norway, and Algiers—containing most-favored-nation clauses. But we at no time recognized the unconditional principle. We regularly established present equality and guaranteed future concessions on a reciprocal basis. We established no differential; quite the contrary. No exclusive arrangement was to be allowed which would work to the disadvantage of parties to other of our treaties. The opportunity was to be given for each country to purchase for itself such favors as might be granted to others for compensation.[3] That

[3] The claim has been made for the treaty of Great Britain of 1815 that it guarantees unconditional most-favored-nation treatment, since it does not contain the "compensation" clause. But see *infra*.

this principle differed from that current before the United States entered the field, and that it differs from that held in Europe today is evident. But it is well to notice that the wording used in American treaties was, and is, different from that used in the older and the newer European treaties.

We have already pointed out that the policy of the United States was one of free commercial intercourse. In these early treaties we find numerous expressions which indicate the intention of their framers. For instance, in the preambles of the treaties with France and Sweden it is laid down that it is the intention to fix in "an equitable and permanent manner the rules" for governing the commercial relations of the two States, that "the most perfect equality and reciprocity" is sought, and that it is an object "to avoid all those burdensome preferences which are usually the sources of debate, embarrassment and discontent." But each country is to be absolutely free to make "those interior regulations which it shall find most convenient to itself * * * founding the advantages of commerce solely upon reciprocal utility and the just rules of free intercourse—reserving withal to each party the liberty of admitting at its pleasure other nations to participation of the same advantages."

It would be unprofitable to repeat from successive treaties to show how the United States continued in the use of the "compensation" clause. The fact that it did so will be amply illustrated when we turn to consider cases of interpretation. It is far more important that we notice the few cases of deviation or apparent deviation from that which we consider the established rule.

First comes that group of treaties known as "unilateral". The United States made treaties of this sort with Morocco, 1787 and 1836, Zanzibar, 1833, Japan, 1854, China, 1858, Egypt, 1884, and the Congo, 1891.[4] Of these treaties, that with Japan is no longer in force, and that with China has been virtually

[4] In the treaty of Sept. 16, 1836, with Morocco, article XIV, the guarantee appears: "The commerce of the United States shall be on the same footing as is the commerce of Spain or as that of the most-favored-nations." In that with the Congo, Jan. 24, 1891, article XI: "The United States shal' enjoy in the Independent State of the Congo as to import duties, all the advantages accorded to the most-favored-nations."

suspended by subsequent treaties. In the application of these agreements, as the United States does not give most-favored-nation treatment in return, the stipulation may be regarded as unconditional most-favored-nation treatment *for* the United States in the realms of the other parties to these contracts. But, from the exceptional circumstances under which a unilateral treaty is made, we can see at once that these do not constitute an infringement of the established rule.

Next comes a group of treaties from which the reciprocity clause was omitted. This includes treaties with Holland, Oct. 8, 1782, Great Britain, 1794 and 1815, France, 1800, and Hanover, 1840. Four of these contain only that clause which expresses the negative side of most-favored-nation treatment. That with France of 1800 contains also the clause expressing the positive side. None contain the words "immediate" or "unconditional". They are, generally speaking, exceptional to United States practice in what they omit, but there is no valid reason for supposing that they guarantee "unconditional" most-favored-nation treatment.[5]

There are, however, three United States treaties which can from their form be put down as guaranteeing absolute and unconditional most-favored-nation treatment. These are the Swiss treaty of Nov. 25, 1850, the treaty with the Orange Free-State, Dec. 22, 1871, and that with Servia of Oct. 14, 1881. None of these contain the compensation clause. In all three the contracting parties guarantee to each other the immediate enjoyment of commercial favors and advantages which they may grant to third nations. The only one of these which has ever occasioned difficulty through a demand by the other party that the United States accord it unconditional most-favored-nation treatment was the Swiss. The clause in the Swiss treaty which caused the difficulty has since been abrogated. The treaty with the Orange Free-State has fallen. The treaty with Servia may be said to stand alone as an unconditional most-favored-nation treaty of the United States.[6]

[5] See further in chapter VIII.
[6] See chapters IV and VIII.

A survey of the list of our treaties in force discloses the fact that the United States employs the clause by no means as regularly as was once the case, and in by no means as large a proportion of its treaties as is the practice of the leading European States. The reciprocity agreement, without the most-favored-nation clause, is the instrument which has been employed in a number of instances in recent years for regulating our commercial dealings with several important nations. But in our most-favored-nation treaties that form of the clause requiring compensation is not only the prevailing but the absolutely determining form.

CHAPTER IV

THE AMERICAN INTERPRETATION

As in our treaty making, so in our interpretation, our practice has been regular, although there are a few cases in which our secretaries of state have strayed from the lines of construction beaten by their predecessors. As our treaty-making authorities have often been subjected to harsh criticism abroad, largely because our treaty-making machinery is not understood, so our department of state has frequently been attacked for its construction of the most-favored-nation clause where the fault was not one of inconsistency upon our part, but was due to the critics' ignorance of our practice and of the intention of the negotiators.

In some cases our secretaries of state, even while following the uniform interpretation, have made loose statements concerning the nature of the clause in justification of that interpretation. Secretary Fish appears to have considered it right to apply to United States treaties the current European interpretation, that is, to regard the most-favored-nation clause as being unconditional.[1] Secretary Gresham held a view different from that which ultimately prevailed concerning most-favored nation obligations in connection with countervailing duties, and his position regarding the mutually exclusive subject matter of Articles VI and XI of our treaty with Russia of 1832 cannot be accepted.[2] Still our diplomatists and our courts have, with remarkable unanimity, maintained that in the operation of the most-favored-nation clause in our treaties, even though the clause itself may not contain an express stipulation to that

[1] See note to Mr. Garcia, May 14, 1869. Moore, *op. cit.*, V, 262.
[2] See note to Prince Cantacuzène, Feb. 16, 1895. Moore, *op. cit.*, V. 274–276.

effect, either contracting party may always require an equivalent for concessions which are demanded in virtue of the clause, except when these concessions have been made freely to third parties.

> You will doubtless have understood that where the words "qualified" and "unqualified" are * * * applied in the most-favored-nation treatment, they are used merely as a convenient distinction between the two forms [which] such a clause generally assumes in treaties, one containing the proviso that any favor granted by one of the contracting parties to a third party shall likewise accrue to the other contracting party, freely if freely given, or for an equivalent if conditional—the other not so amplified. This proviso, when it occurs is merely explanatory, inserted out of abundant caution. Its absence does not impair the rule of international law that such concessions are only gratuitous (and so transferable) as to third parties when not based on reciprocity, or mutually reserved interest as between the contracting parties. This ground has been long and consistently maintained by the United States.[3]

The United States first had occasion to define its position expressly and to defend it vigorously in the controversy which arose over the provisions of the treaty of April 30, 1803, with France, article VIII of which provides:

> In future and forever after the expiration of the twelve years, the ships of France shall be treated upon the footing of the most-favored-nation in the ports above mentioned.[4]

When, subsequently, under the operation of the reciprocal agreement between the United States and Great Britain, July 3, 1815, the ships of the latter enjoyed a national treatment in the harbors of the United States, which was not allowed to the ships of France, the French government, while refusing to grant an equivalent to the United States, demanded the same treatment which was accorded to England, insisting upon the literal inter-

[3] Mr. Bayard to Mr. Hubbard, July 17, 1886. Moore, *op. cit.*, V, 273. *Cf.* Whitney *v.* Robertson (1888), 124 U. S. 190.

[4] Moore, *op. cit.*, V, 257-260. American State Papers, For. Rel., V.

pretation of the most-favored-nation clause, contending that "a clause which is absolute and unconditional can not be subject to limitation or any modification whatever." The United States government emphasized the equivalent. The French replied that France had given an equivalent at the time of the cession of Louisiana. The United States argued for a more specific equivalent, saying that if they were to give France *freely* that for which England had paid, France would be enjoying a treatment more favored than that of the most-favored-nation. This was the position held by Mr. Adams, President Monroe, and Mr. Gallatin, whose notes have been repeatedly quoted by United States Secretaries.

> It is true that the terms of the eighth article are positive and unconditional; but it will readily be perceived that the condition, though not expressed in the article, is inherent in the advantage claimed under it. If British vessels enjoyed, in the ports of Louisiana, any gratuitous favor, undoubtedly French vessels would, by the terms of the article, be entitled to the same.[5]
>
> But the allowance of the same privileges * * * to a nation which makes no compensation, that have been conceded to another nation for compensation, instead of maintaining, destroys that equality * * * which the most-favored-nation clause was intended to secure. It concedes for nothing to one friendly nation what the other gets only for a price.[6]

To M. Visser, this argument appears beside the point. He fails, however, to show conclusively just how it is so. Although it is true that "if, on examination, it appears that the third nation possesses a certain favored treatment, it matters little to others in what manner the third has obtained it,"[7] this does not make a breach in the soundness of the general contention of the United States. The whole difference may finally be sifted down to a distinction between the two views as to what constitutes "a

[5] J. Q. Adams, Dec. 23, 1817. Am. St. Pap., For. Rel., V, 152.
[6] Mr. Sherman to Mr. Buchanan, Jan. 11, 1898. Moore, *op. cit.*, V, 278.
[7] Visser, *op. cit.*, 273.

favor."[8] It is this difference of opinion which causes M. Visser to characterize the American argument as a "jeu de mots."[9]

In 1821, Mr. Monroe worded our doctrine clearly in his message to Congress. In 1823 Mr. Gallatin stated expressly that in our view the extension of favors to a third party is dependent upon the giving of an equivalent in compensation. This was again stated by Mr. Livingston in 1832. It was repeated and explained by Attorney General Cushing in 1853, and by Secretary Frelinghuysen in 1884, and by Secretary Sherman in 1888.

The treaty of the United States with Colombia, Oct. 3, 1824, provided that advantages given by either nation to a third party should be extended to the co-contractant, "freely if the concession was freely made," upon "compensation if the concession was conditional." Later the United States claimed the right to certain advantages which Central America was enjoying under a treaty with Colombia. When the Colombian government pointed out that its treaty with Central America was made upon a reciprocal basis, the United States conceded that its claim was unwarranted, and proceeded to arrange to grant to Colombia an equivalent for the advantages which were demanded.

The treaty of May 1, 1828, between the United States and Prussia, under the provisions of which Germany has made repeated claims against the United States, contained ten articles on the subject of reciprocal commercial relations. Article IX specifies that any favor granted to a third nation by either of the contracting powers shall immediately become common to the other, but adds the conditional clause. A simple illustration of the rights which Germany has claimed by virtue of this most-favored-nation clause is that made in 1894, that German salt should be allowed to enter ports of the United States, duty free. At the same time American salt was subject to duty in the ports of Germany. Secretary Olney answered that the position of the German government was absolutely untenable; that the principle the United States has regularly maintained was that of reciprocity; and that this position had already been acquiesced in by both Germany and Great Britain.[10]

[8] *Cf.* Barclay, Problems of International Diplomacy, 138 ff.
[9] *Cf.* Visser, *op. cit.*, 273, and Caravetta, *op. cit.*, 99.
[10] *Cf. infra*, chapter VIII.

When Austria, under the treaty of August 27, 1829, claimed that her wines should enter the United States at the same rate as did the French wines under the treaty of 1831, the United States government pointed out the difference between favors freely granted and reciprocal advantages, and at the same time suggested that no nation intends to bind itself by a condition which will render it unable to make further treaties, a fair interpretation of the most-favored-nation clause being, that, "if the duties were lessened in favor of any other nation, the contracting parties should obtain a like reduction for the same equivalent."[11] The United States has carefully avoided placing itself in a position where its liberty as regards future negotiation will be restricted or where other nations shall enjoy privileges in trading with us which we do not enjoy in return.[12]

After the conclusion of the reciprocity treaty of the United States with France, May 28, 1898, the Swiss demanded for Swiss imports into the United States the same concessions made to France. Their claim was based upon the treaty between the United States and Switzerland of November 25, 1850, which provided reciprocal most-favored-nation treatment in all that relates to importation, exportation, and transit, and that no favors in commerce should be granted by either to a third nation which should not immediately be enjoyed by the other, etc. It was shown that there was no conditional clause in this treaty and that by the understanding between the negotiators Switzerland had been given a "full and unlimited guarantee of the fullest most-favored-nation treatment." Secretary Hay, having examined the original correspondence, and having become satisfied that the American plenipotentiary Mr. Mann had agreed at the time of the negotiation that "no limitation should be attached to the most-favored-nation clause" and had accepted the interpretation of the Swiss government, declared that "both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty

[11] Moore, *op. cit.*, V, 261.

[12] *Cf.* Mr. Fish's refusal to make a treaty with Argentine for a fixed scale of duties, 1869, Moore, *op. cit.*, V, 262; the action of the United States when unexpected consequences followed the making of the treaty with Belgium of July 17, 1858 (*Ib.*, 262-263).

should be carried into effect," although this formed an exception to the otherwise uniform policy of the United States. "Should this government continue to give to Swiss products gratuitously all advantages which other countries acquire from an equivalent compensation, it would expose itself to just reproaches from other nations for exceptional favoritism. We desire that our friendly international policy should be maintained in its uniform application to all our commercial relations." The customs officers were instructed to extend to imports from Switzerland the same rates imposed upon similar French goods under the recent agreement. Germany and other states soon claimed the same treatment. On March 23, 1899, the United States gave notice of its intention to stop the operation of the articles in question in the Swiss Treaty and they ceased to have effect March 23, 1900.[13]

The Swiss in return for this, although the United States was in no way discriminating against them, applied their maximum tariff to imports from the United States. In 1906, when the new Swiss tariff went into effect, a basis for reciprocally advantageous treatment was arrived at, but without the formality of a treaty.

The position of the United States both as regards the regular interpretation and in extraordinary cases was thoroughly set forth in the diplomatic correspondence which followed the making of the treaty with Hawaii, January 30, 1875. In this, a treaty of strict reciprocity and unusual favors, it was stipulated that, in consideration of very material advantages in return, each country would admit certain articles from the other, duty free (articles I and II), and that no other nation should have the same privileges in Hawaii as the United States, nor would Hawaii make treaties with any giving them such (article IV). The English government protested.[14] England had an agreement with Hawaii (Treaty, July 10, 1851), that neither country would charge higher duties upon articles from the other than upon the same articles from any third nation. It has been usual for United States diplomats, to say that, as between two states

[13] U. S. For. Rel., 1899, 740-748, 753-757. Moore, *op cit.*, V, 285.

[14] Sweden, Belgium, and Holland also protested under treaties of July 1, 1852, Oct. 4, 1862, and Oct. 16, 1862, respectively.

which have a most-favored-nation treaty, each may demand and secure favors given by the other to a third, providing it, the second, will grant to the first concessions equivalent to those granted by the third. But under the provisions of this treaty, Hawaii was unable to extend even this right to England, so it appears that in order for her to keep her treaty obligations with the United States it was necessary for her to break her promise to England and to establish an effective discrimination against English and other goods. From this fact it might seem that M. Visser's suggestion, that the action of the United States in this case was not in agreement with the doctrine which it maintains, is correct. But the case was an exceptional one. Not only did the United States hold that "the concession of these privileges to the United States can not form the basis for a claim to like privileges under the parity clause of the ordinary form of treaty, as such special privileges were given in return for special valuable considerations," but it considered this as, for geographical and political reasons, a special and extraordinary case. This view was certainly justified, and it was soon so recognized by Great Britain. In the arrangement between Hawaii and Germany, 1878, it was specified that the special advantages granted to the United States should not be invoked as a precedent for treatment of Germany.[15] The Hawaiian case was held exceptional in a very clearly worded decision in the United States Supreme Court, 1887.[16] In this case, in which Denmark relied upon the most-favored-nation clause in her treaty of April 26, 1826, the Supreme Court held:

> These stipulations * * * do not cover concessions like these made to the Hawaiian Islands for valuable considerations. They were pledges * * * that there should be no discrimination * * * in favor of goods of like character imported from other countries * * *. They were not intended to interfere with special arrangements with other countries founded upon a concession or special privileges.[17]

[15] See U. S. For. Rel., 1878, 382-383, 403, 405.
[16] Bartram *v.* Robertson, 1887, 122 U. S. 116.
[17] See also U. S. For. Rel., 1881, 622 ff; and Herod, *op. cit.*, 116 ff.

In this connection it is interesting to turn to the treaty between the United States and Tonga, Oct. 2, 1886. In article II, after stipulations for most-favored-nation treatment, appears the following clause:

> it being understood that the Parties hereto affirm the principle of the law of nations that no privilege granted for an equivalent or on account of propinquity or other special considerations comes under the stipulations herein contained as to the most-favored-nations.

This was doubtless inserted on account of the difficulties which had arisen over the Hawaiian treaty.[18]

The following case suggests a decided inconsistency on the part of the United States. In the treaty between the United States and Prussia, 1828, referred to above, article V reads: "No higher or other duties shall be imposed on the importation into" either of any article the produce or manufacture of the other "than are or shall be payable on the like article being the produce or manufacture of any other foreign country * * * ." Article IX reads: "If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted * * * or on yielding the same compensation, when the grant is conditional." To Germany's contention that article V is the regulating factor, the United States has repeatedly answered that the conditions of article IX have a modifying effect on article V and that only in return for an equivalent can concessions granted a third nation on a reciprocal basis be granted to the second. Now in a treaty between the United States and Hayti, November 3, 1864, article II provided that favors in commerce and navigation which either had granted or should grant to a third party should extend "in identity of cases and circumstances" to the other; "gratuitously if * * * gratuitous; or * * * for compensation if * * * conditional." Article IX provided: "* * * no higher or other duties upon the tonnage or cargo of the vessels" of one shall be levied in the ports of the other

[18] See Snow: American Diplomacy, 176. Contrast with this the treaty between Great Britain and Tonga, Nov. 29, 1879, art. II.

than are levied or collected on the vessels of the most-favored-nation. July 31, 1900, Hayti made a treaty with France which was evidently reciprocal in its nature, France granting Hayti certain privileges in return for which Hayti reduced the tonnage dues paid by French sailing vessels and the dues on merchandise landed from them, if of French origin. The United States government at once demanded the same rights for American vessels under article IX of the treaty of 1864. The Haytian government invoked the application of article II. The United States government answered that "Article IX is quite independent of article II, and creates absolute rights which this government can not fail to insist upon." The correspondence indicates that the American officials were decidedly out of patience with Hayti, and their communications, unfortunately, do not indicate clearly the line of argument by which they maintain this position.[19] Unless some special significance can be attached to the phrase "in identity of cases and circumstances" in article II, or unless the United States can point out some particular circumstance whereby the grant made by Hayti to France was "freely made" rather than a return for compensation, it is difficult to arrive at any other conclusion than that this forms an arbitrary exception to the practice of the United States.

Another case in which the action of the United States appears open to criticism is that of the treatment accorded to Colombia under the Act of October 1, 1890. This Act admitted certain articles to the United States duty free, but allowed the President, if he considered the duties of any country reciprocally unequal, to suspend the free list upon goods of such country. After the failure of attempts to negotiate a reciprocity treaty with Colombia, the President, March 15, 1892, suspended the free list on certain products of Colombia. We had made reciprocity arrangements with four European and six South and Central American countries, but at the same time goods from Mexico and Argentina similar to the products in question were enjoying, gratuitously, it seems, the advantages of the free list. Colombia, relying upon her favored-nation-clause,

[19] U. S. For. Rel., 1901, 278-279.

protested. To the insistent and fiery notes of the Colombian Minister, the Department of State replied in a lengthy correspondence which contains excellent suggestions as to diplomatic "good form" but fails apparently to answer the logic of the Colombians or to analyze to any extent the justice of their demands.

Mr. Blaine's assertion to Mr. Hurtado that "the law cited [the Tariff Act of 1890] applies the same treatment to all countries whose tariffs are found by the President to be unusual and unreasonable" does not altogether meet the question involved.

At the same time, the practice of other nations presents instances of inconsistencies, though in no case are these sufficient to disestablish the regularity of their interpretations. In 1885, under the guidance of Bismarck, who asserted that the relations of Germany and the United States were on the basis of the most-favored-nation, the Bundesrat expressly included the United States in an ordinance granting to the most-favored-nations the lower duties conceded to imports of rye from Spain; but in 1883, in a similar ordinance extending to most-favored nations certain concessions recently granted to Spain and Italy, the United States had not been included. In 1891, Germany negotiated a series of treaties with European countries for reciprocal reductions of import duties. To have been consistent with the principle advocated in 1885, Germany should have extended to the United States the reduced duties granted to various European countries. This she did not do. The Saratoga Convention of August 22, 1891, was based on reciprocity and was, in character, a bargain in return for concessions.[20]

[20] See Stone: Most-favored-nation relations between Germany and the United States, N. Am. Rev., 1906, 182: 433-445. See chapter VIII.

CHAPTER V

ENGLISH PRACTICE AND INTERPRETATION: THE UNCONDITIONAL CLAUSE

England has been as consistent in maintaining that the clause is absolute as has the United States in its policy. In 1884, Mr. Frelinghuysen said of the English position: "The English contention has hitherto been, under the most-favored-nation clause, * * * that it is absolute, and that even when Japan may bargain with any power to give it a favor for an equivalent the favor must be granted to England without equivalent. The Japanese contention is the reverse of this * * *" *i. e.*, in agreement with that of the United States.[1]

In 1885, Earl Granville wrote:

> From this [the American] interpretation, Her Majesty's government entirely and emphatically dissent. The most-favored-nation clause has now become the most valuable part of the system of commercial treaties, and exists between almost all the nations of the earth. It leads more than any other stipulation to simplicity of tariffs and to ever-increased freedom of trade; while the system now proposed would lead countries to seek exclusive markets and would thus fetter instead of liberating trade. It is moreover obvious that the interpretation now put forward [just that which the United States has *always* put forward] would nullify the most-favored-nation clause; for any country, say France, though bound by the most-favored-nation clause in her treaty with Belgium, might make treaties with any other country involving reductions of duties on both sides, and, by merely inserting the statement that these were

[1] Mr. Frelinghuysen to Mr. Bingham, June 11, 1884, MS. Inst. Japan, III, 253. Moore, *op. cit.*, V. 267.

> granted reciprocally and for a consideration, might yet refuse to grant them to Belgium unless the latter granted what France might consider an equivalent. Such a system would press most hardly on those nations which have already reformed their tariffs and have not an equivalent concession to offer, and therefore Great Britain, which has reformed her tariff, is most deeply interested in resisting it.[2]

This last sentence contains within the compass of its few words the key to the English position and the explanation of the English interpretation. The English have been true to these principles, although their practice like that of the United States has at times made exceptions. There have been more cases in which the English have used the conditional form of the clause than cases in which the United States has used the unconditional.

English treaties have been, however, as a rule, both in wording and in interpretation, unmodified. The purport of their most-favored-nation provision is in general, that "in all matters and regulations of trade and navigation, each of the high contracting parties will treat the other upon the footing of the most-favored-nation."[3]

A favorite form of the clause in English treaties, found constantly recurring, often in identical form, sometimes with slight variations of wording, is the following: "The contracting parties agree that, in all matters relating to commerce and navigation, any privilege, favor, or immunity whatever, which either * * * has *actually* granted or may hereafter grant to the subjects or citizens of any other state shall be extended immediately and unconditionally to the subjects or citizens of the other contracting party; it being their intention that the trade and navigation of each country shall be placed, in all respects,

[2] Earl Granville to Mr. West, Feb. 12, 1885. Parl. Pap., Commercial, No. 4 (1885), 21-22. Moore, *op. cit.*, V, 270-271.

[3] Treaty between Great Britain and Sweden-Norway, March 18, 1826, art. IX. In the treaty between England and France, Jan. 26, 1826, art. IV provides: "It is mutually agreed between the high contracting parties that, in the intercourse of navigation between their two countries, the vessels of any third power shall in no case obtain more favorable conditions than those stipulated in the present convention in favor of British and French vessels."

by the other on the footing of the most-favored-nation."[4] Another form found repeatedly in English treaties in common with those of other nations reads: "No higher or other duties," or "no higher or other import * * * or export duties" shall be paid on the goods of one country in the territories of the other than are payable on like goods of other countries.

Earlier British treaties simply stipulated for "reciprocal liberty of commerce,"[5] or "reciprocal freedom of commerce."[6]

The unconditional most-favored-nation clause was without exception the form used in British treaties in the eighteenth century, but, while this was the rule for treaties of the earlier period, and while the unconditional clause occurs in all the English treaties now in force, the use of the conditional form was by no means foreign to English practice during the first half of the nineteenth century, the period in which the American principle of reciprocity was gaining strength. Instances of this deviation will be given in the following chapter.

A review of the circumstances which have attended the regular occurrence of the clause in modern English treaties furnishes an object lesson in both the advantages and disadvantages which attend its use. Its extensive and emphasized employment, with a very definite and determined object, became one of the leading features of English commercial politics after the making of the Cobden treaty (1860). As the practical champion of commercial liberalism, and as the advocate of universal free trade, England found the most-favored-nation clause a necessary and invaluable instrument. It soon became evident that although the English were enjoying all the benefits which France extended to the trade and commerce of every other nation, yet the balance of advantages under that treaty was in favor of France. The

[4] Treaty between Great Britain and Paraguay, Oct. 16, 1834, art. II. *Cf.* also treaties of Great Britain with Honduras, Jan 21, 1887; France, Feb. 28, 1882; Mexico, Nov. 27, 1888; Japan, July 16, 1894.

[5] Treaty between United States and Great Britain, July 3, 1815, art. I.

[6] Great Britain and Venezuela, April 18, 1825, art. II; and Great Britain and Russia, Jan. 12, 1859, art. I. In the convention between Great Britain and the United States, March 2, 1899, and Jan. 13, 1902, art. V, appears the following: "In all that concerns the right of disposing of every kind of property, real and personal, citizens or subjects of each * * * shall in the dominions of the other enjoy the rights which are or may be accorded to the subjects or citizens of the most-favored-nation."

influence of the new conditions upon British policy is apparent in the treaties which followed with Belgium, July 23, 1863, with Italy, August 6, 1863, and with Prussia and the Zollverein May 30, 1865. In the last-named treaty, England acquired a position more favored than that of France, in that most-favored-nation treatment was extended to the British colonies and all other English possessions. Between 1860 and 1866, England made other most-favored-nation treaties with Turkey, Salvador, Austria and Colombia. After the change occasioned in Anglo-French commercial relations by the temporary change in French policy, in 1872, a new treaty was made between the two nations, July 23, 1873. Treaties were also made with the Bey of Tunis, July 19, 1875, and with Austria, November 26, 1877. In these treaties the English invariably insisted upon the insertion of the most-favored-nation clause.[7]

In the pursuit of this policy Great Britain generalized the concessions made to France in 1860. It gave, regardless of reciprocal concessions, to the whole circle of commercial states the tariff concessions which France had purchased. The result was that England, giving her advantages away freely, was unable to make treaties with Spain and Portugal, which countries cheerfully profited by the general lowering of the English tariff on wines, but demanded that if they were to make any concession to Great Britain a special concession must be made them, and, such not being forthcoming, instituted a differential against England.

The convention made between England and France, February 28, 1882, guaranteed to "goods of English origin or manufacture," with the exception of "colonial produce," most-favored-nation treatment. On May 22, 1882, England made a most-favored-nation treaty with Portugal, the latter reserving the right to concede special advantages to Brazil. The treaty made with Italy, June 15, 1883, was based entirely on most-favored-nation treatment.[8] England also won, against much opposi-

[7] In 1907, Jan. 1, Great Britain had treaties containing the most-favored-nation clause with no less than forty-six different countries, and the clause appeared in no less than eighty-three British treaties, conventions and agreements See Parl. Pap., Commercial No. 3 (1907), (cd. 3395).

[8] U. S. For. Rel., 1878, 402.

tion, a most-favored-nation treaty with Spain, April 26, 1886, in which the expressed advantages were extended to the colonies of both contracting parties. Between 1880 and 1890 other treaties, too, of the same general character were made with Servia, Roumania, Ecuador, the Transvaal, Montenegro, the Kongo, Uruguay, Egypt, Mexico, Paraguay, Honduras, and Greece. Thus, in the prosecution of this policy, England achieved many advantages. She was giving very little—for how much could she, with her free trade policy, concede?—and for this little she was getting much.[9]

She had much reason to be flushed with the success of her commercial policy; yet, both free trade and the unlimited interpretation of the most-favored-nation clause were destined to cause England no little inconvenience.

Lord Clarendon appears to have yielded to the American interpretation in 1856. During the discussion over the Hawaii-United States treaty of 1875, it was discovered that he had informed the Hawaiian government in 1856 with reference to the unratified reciprocity treaty which had been signed at Washington in the preceding year, that, "as the advantages conceded to the United States by the Sandwich Islands are expressly stated to be given in consideration, and as an equivalent for, certain reciprocal concessions on the part of the United States, Great Britain can not as a matter of right, claim the same advantages for her trade under the strict letter of the treaty of 1851" [Great Britain-Hawaii].

Lord Derby, in an instruction to the British representative at Honolulu, Jan. 25, 1878, said that "only under the peculiar circumstances of the case" could the British government agree to the differential treatment of British goods by Hawaii [in favor of the United States].[10]

In 1884, Lord Granville demanded that the advantages which the United States was conceding to Hawaii and some states of South America, especially in regard to the importation of sugar, be extended to the British West Indies. This demand was based

[9] To this treaty there was annexed a protocol providing for arbitration in case of difficulty over interpretation. *Cf.* Smart, The Return to Protection, 130.
[10] U. S. For. Rel., 1879, 512. Moore, V, 264-5.

on the most-favored-nation clause (article II) in the treaty between the United States and Great Britain of July 3, 1815.[11] The United States answered that the clause should not and could not be interpreted in this sense.

With the rise of the sugar-bounties question, England found her attitude concerning countervailing duties inconsistent with her interpretation of the most-favored-nation clause. This question caused considerable agitation in England and in several of the colonies, and it was even urged that the government be given freedom to use, when circumstances warranted, some of the instruments of protection.

The preferential tariff movement led to a propaganda in the British colonies, especially in Canada, against the clause of the most-favored-nation. This agitation soon centered in the Imperial Federation League. The chief grievance against the clause arose from the fact that it prevented the colonists from conceding special advantages, which they desired, to their trade with the mother country. The clause operated so as to extend at once such favors as were granted to the latter, to other nations. The operation of the clause appears to have extended also to trade between the colonies and thus to have been altogether an obstacle to preferential treatment. In 1890 the Canadians made a strenuous attack upon the clause and voted that it be not inserted in future treaties. The Canadians regarded it as all-important to their trade that this obstacle be removed, and they presented memorials to that effect to the crown in 1893. The Imperial Government in its reply emphasized the importance of the clause in maintaining British commercial independence. Recognizing its failure in the attempt to convert the world to the principles of free trade, the English government regarded the most-favored-nation clause as an instrument by means of which England could "so to speak, enjoy indirectly the benefits and advantages enjoyed by other states."[12]

Canada passed, April 23, 1897, a tariff act of which article XVII read:

[11] "No higher or other duties * * * on the imports or exports of any articles the growth, produce, or manufacture of the territories of one * * * into one from the other * * * than payable on the like articles * * * of any other foreign country."

[12] Cavaretta, *op. cit.*, 125.

"When the customs tariff of any country admits the products of Canada on terms which on the whole are as favorable to Canada as the terms of the reciprocal tariff referred to are to the countries to which it may apply, articles which are the growth, produce or manufacture of such country, when imported directly therefrom, may then be entered for duty or taken out of warehouse for consumption in Canada at the reduced rates of duty provided in the reciprocal tariff set for them in schedule D."

It was urged against this law that it conflicted with the English treaties of commerce with Belgium, July 23, 1862, and with Prussia, May 30, 1865, which provided that the products of those countries should not be subjected in English colonies to higher duties than the produce of the United Kingdom or any other country of like kind. The Canadian government argued, relying upon the American example, that there would be no unequal treatment, because Belgium and Germany could obtain the same treatment as England upon satisfying the same conditions. In view of the wording of the English treaties, and of the policy of England with regard to these treaties, this argument seems unsupportable, as neither coincides with, and therefore neither can depend upon, the principles upon which the United States practice is based.

In the colonial conference of 1897 the Premiers agreed that the admission of other nations to the benefits of the preferential treatment could not be allowed. Mr. Chamberlain recommended the denunciation of all treaties which "hampered" closer trade relations between Great Britain and her colonies. In July, 1897, the Belgian and German treaties were abrogated by the Imperial Government so that the provisions of the Canadian tariff law might go into effect. Other nations then recognized the contention that arrangements made between England and Canada came under a special class as colonial arrangements, and refrained from demanding similar treatment under the most-favored-nation clauses in their treaties. At the same time it is necessary to notice the fact that Canadian tariff policy is autonomous, which takes Canadian arrangements out of the class of ordinary colonial arrangements.

Since 1898 Germany has excluded Canada from the most-favored-nation treatment which she accords to Great Britain and most British possessions. What amounts to a tariff war has been waged between the two countries for more than ten years. The Canadian tariff of 1907 and the subsequent Franco-Canadian commercial convention has served on the one hand to increase the irritation of the Germans and on the other to make them very solicitous to end the difficulty. Steps are being taken to arrive at an agreement.

The free-trade example of England failed to bring about the cosmopolitanism which had been the cry of the Cobdenites. Universal free trade was not to be realized with a bound.

First came the "return to protection", Germany and France leading in the movement, and then the "increase of protection", Germany being the leader. The movement of recent years, the revision of tariffs following the German example and the making of tariff-treaties subsequent, have, to be sure, resulted in certain reductions, but have resulted on the whole in a very appreciable net increase in the general schedules. This means a building up, not a lowering, of protective walls, a distinct indication that modern statesmen are less than ever ready to surrender to free trade principles. Free trade may come—as may perhaps universal disarmament—as a result rather than as a cause of cosmopolitanism, but in the meantime the pioneer finds it hard indeed to be consistent, to defend and to maintain his commercial position without using weapons similar to those which his competitors employ.[13]

[13] "I want to point out to you, what I observe is that while A is very anxious to get a favor of B, and B is anxious to get a favor of C, nobody cares two straws about getting the commercial favor of Great Britain. What is the reason of this? It is that in this great battle Great Britain has deliberately stripped herself of the armor of weapons by which the battle had to be fought. The weapon with which they all fight is admission to their own markets. * * * If you intend, in this conflict of commercial treaties, to hold your own, you must be prepared, if need be, to inflict upon the nations which injure you the penalty which is in your hands, that of refusing them access to your markets." Lord Salisbury, speech at Hastings, May 18, 1902.

The final report of the English tariff commission is expected soon. "It is expected to take advance ground in behalf of Chamberlain's preferential program." * * * "It is the opinion of many confident observers" [that England is being driven] * * * "inevitably back to the repudiated protective system." Ogg, F. A.: European Tariff Laws and Policies, Rev. of Rev., 1909, 39: 427-432.

It is evident, not only from the mass of writing upon the subject, but from the action of the government, that the English are undergoing a change of sentiment as concerns commercial policy, and by no means the least among the indications of this is the attitude of the English Foreign Office in the first few years of this century toward English obligations under the most-favored-nation clause.

CHAPTER VI

EUROPEAN AND WORLD PRACTICE: A BACKGROUND FOR INTERPRETATION

Before turning to consider the views of several of the leading writers who have discussed the theory and practice of the most-favored-nation clause, it will be well to get clearly in mind certain circumstances which have attended its use in different periods. A knowledge of the time when a treaty was made will be found to be absolutely essential in many cases if we wish to arrive at a proper interpretation of some of its clauses.[1]

In the first place, and of primary importance, most-favored-nation treatment has now, and had in the eighteenth century, a different meaning in European policy from that which attached to it between 1825 and 1860. While European countries now give the clause a form and an interpretation corresponding approximately to that in vogue in the eighteenth century, the universalizing of favors, which that old form might be expected to entail, is largely modified by the mechanism of modern tariff policy.

We have already indicated that the eighteenth century was that of the unconditional clause, and we have noted that the United States in 1778 entered the arena of world-commerce with the principle of opening her ports and guaranteeing equal treatment to all comers—upon a basis of reciprocity. This policy, which did not preclude the granting of special privileges, was clearly a policy of *do ut des,* and it has been indicated that it was such by the use of the conditional form of the clauses. Among the states which made use of the clause in that century, Great Britain led in the number of favored nation treaties, while the United States came second.

[1] For an exhaustive study from this point of view, Dr. Glier's Die Meistbegünstigungsklausel is invaluable.

In the first quarter of the nineteenth century the tide set strongly toward the general adoption of a policy of freedom of commerce. At the same time the American principle of "compensations" was written into a widening circle of treaties wherein this extension of commercial privileges was regulated on a basis of reciprocity. The unconditional form of the most-favored-nation clause began to be superseded by the conditional. The first treaty between European states in which there appeared the form originated by the United States was that between Great Britain and Portugal, Feb. 19, 1810. In this treaty, article II, we find the guarantee that any favor, etc., granted by either of the contracting parties to a third nation shall be accorded to the other

> gratuitously if the concession in favor of that other state shall have been gratuitous, and on giving, *quam proxime*, the same compensation or equivalent, in case the concession shall have been conditional.

In 1824 the United States made a treaty with Colombia which marks the introduction of the clause to South American practice. This was followed in 1825 by a similar treaty of the United States with the Central American Confederation,—and thenceforth for twenty-five years South and Central American treaties regularly contained the conditional form.

Of the important treaties made between 1826 and 1830, numbering about a score, only about one-fourth contain the unconditional form of the clause. Among others containing the conditional form, on the basis of reciprocity, we find treaties between: the United States and Denmark, April 26, 1826; the Hanse Cities, Nov. 27, 1827; Prussia, May 1, 1828; Brazil, Dec. 12, 1828; Austria, Aug. 27, 1829; Brazil and the Hanse Cities, Nov. 27, 1827; Prussia, April 18, 1828; Colombia and the Netherlands, May 1, 1829. Five of these were still in force at the end of the century.

Although the point of the wedge had entered, European countries still held in their treaties *inter se* to the unconditional form of the clause until about 1830. Then, as international trade was rapidly increasing, and as the influence of American commercial practice began to be felt, the principle of reciprocity

was eagerly seized upon in Europe, and a whole series of treaties upon this basis ensued. The period from 1830 to 1859 was outspokenly a reciprocity period. In treaties the unconditional form of the most-favored-nation clause appeared more and more rarely, and where it did appear its guarantee was usually only unilateral. England forms somewhat of an exception. She was conservative, and her treaties exhibit a tendency to retain the unconditional clause, while some of the northern states also held to that form. But even England did not abstain altogether from the use of the conditional. We have cited the treaty of 1810 with Portugal. To this may be added a treaty of July 3, 1838, with Austria, in which we find

> "leurs majestés—s'engagent réciproquement á n'accorder aucunes faveurs, priviléges [etc. to a third state] qui ne soient en même temps accordés [etc. to the co-contractant] gratuitement, si la concession—a été gratuite, ou en donnant, en autant qu'il sera possible, le même équivalent, dans le cas où la concession aura conditionnelle. (Article XI.)

In January, 1843, Great Britain made a treaty with Russia containing the same formula. The treaty with Liberia, Nov. 21, 1848,[2] contained the conditional form, and the same appears in treaties which Great Britain made between 1849 and 1853 with Costa Rica, Dominica, Peru, Hawaii, Sardinia, Ecuador, and Paraguay.[3]

[2] Art. VII. "It is hereby agreed between them that any favor, privilege, or immunity whatever, in matters of commerce and navigation which either * * * has actually granted, or may hereafter grant, to the subjects or citizens of any other State, shall be extended to the subjects or citizens of the other * * * gratuitously, if the concession in favor of that other state shall have been gratuitous, or in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional."

[3] The treaty with Hawaii (1851), for instance, contains the guarantee of reciprocal treatment in the following form:

Article III. " * * * or in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession has been conditional."

Contrast the form in this group of treaties with that contained in a treaty which Great Britain made with the American state, Nicaragua, on Feb. 11, 1860:

Article II. "The High Contracting Parties further engage that neither will grant any favor to any other nation in respect of commerce and navigation which shall not *immediately* become common to the other contracting party."

An examination of the treaties made in this period by Austria, Belgium, France, Holland, Portugal, Sardinia, Sicily, Spain, and the Zollverein, as well as those already mentioned, shows a large return of clauses in the conditional form with the definite stipulation that compensation must be made for privileges demanded. Moreover, an examination of commercial and tariff history shows that reciprocity was the guiding principle in the commercial relations of all western nations from 1825 to 1860. Thus Dr. Glier exhibits thirty-eight treaties of the German states of which the twenty-one made with American states all used the conditional form, while the seventeen with European states almost without exception stipulated in one form or another for the conditional treatment.[4]

It should be kept in mind that where most-favored-nation treatment is promised the guarantee usually occurs in double form, representing both the positive and the negative sides, the latter usually preceding the former. Upon the negative side it is promised that "no higher duties shall be imposed upon the products of either party in the territories of the other than are payable upon like products of any other foreign land." But this must be read in connection with the statement of the positive side which accompanies it; if either party makes special concessions to a third, the other shall be accorded the same—but (when the conditional form of the clause is used) only upon offering an equivalent for the compensation which was made by the third, in case there was a compensation. This qualifying clause appears in most of the treaties of the period under discussion. Furthermore, certain treaties which at first sight appear to have been unconditional, are found upon examination to have been modified and made conditional by supplementary conventions.[5] There are still a goodly number of

[4] "Hunderte von Verträgen sind abgeschlossen worden, in denen der Mitgenuss der von dritten Staaten gewährten Vergünstigungen von einer Gegenleistung abhängig gemacht war. **Dies war von 1825–1860 weitaus die Regel.**" Glier, 16. See also p. 128. In this period, "In erster Linie waren es in Europa die heute im Deutschen Reich geeinten Staaten welche den Reziprocitätsgedanken pflegten * * * ." Glier, 123.

[5] *e. g.* **Treaty between France and Liberia, April 17, 1852, supplemented by an agreement, April 21. See other French treaties.**

treaties of that period in force, not American alone, but many European as well.[6]

While reciprocity was unquestionably in the ascendant, and while the conditional clause was generally adopted it would be wrong to infer that the unconditional form went entirely out of use. Most of the important states adopted, and made their treaties according to, the prevailing principle, yet the retention of the unconditional form of the favored-nation clause in many English treaties and in those of the northern states is not to be overlooked, while in the fifties we find this form reappearing in certain treaties of south-central Europe.[7] In 1850 Cavour began in Sardinia a commercial policy which led within the next two years to the making of eight treaties in which, in addition to the most-favored-nation clause, the important feature was that the tariff reductions to be made were specified. These were tariff treaties, which may be remembered when we think of the prominent place which treaties of that form have been given among the commercial instruments of the countries of Middle Europe in the last fifteen years. Belgium, Holland, and Sicily at once followed the example of Sardinia in the use of the tariff-treaty.

Between 1850 and 1865 the tariff policy of Europe underwent a complete transformation. In spite of the influence of such economists as List and Carey, protectionist principles and traditions were completely abandoned. The turning point is usually dated at the Cobden treaty between England and France, Jan. 23, 1860. There were precedents for this treaty in those of Great Britain with Sicily, April 29, 1845; the Sardinian treaties with Belgium, Switzerland, and Austria, 1851, and the Belgian treaty with Holland, Sept. 20, 1851. In a treaty which Russia made with France, June 2–14, 1857, we find most-favored-nation treatment in a conditional clause (article XIV); but in the treaty which Russia concluded with Great Britain, Jan. 12, 1859, the clause appears (article X) in the unconditional form.

[6] United States treaties of that period still in force include those with Argentina, Austria, Bolivia, Colombia, Costa Rica, Denmark, Great Britain, Norway, Persia, Russia, Siam, Sweden, Turkey, and Zanzibar.

[7] Examples: Great Britain-Holland, Oct. 27, 1837; Sardinia-Switzerland, June 8, 1851; Zollverein-Austria, Feb. 19, 1853.

This treaty contains no hint of the compensation principle. Yet Russia was an outspoken reciprocity state. The inference as regards the British attitude and influence is obvious.

In the Cobden treaty, article XIX, each of the high contracting parties agrees to give the other every favor, etc., on the articles "mentioned in the present treaty" which it may grant to any third power. This partial statement was supplemented by the *real* and extensive most-favored-nation clause which appeared in the complementary convention of Nov. 16, 1860, in which article V reads:

> Each of the High Contracting Powers engages to extend to the other any favor, any privilege or diminution of tariff which either of them may grant to a third Power in regard to the importation of goods *whether mentioned or not mentioned in the treaty of 23rd of January, 1860.*

No suggestion is made of any compensation.

England was not alone in abandoning the old, and setting the seal of approval upon the new commercial policy. European nations turned enthusiastically toward the idea of removing the artificial restrictions by which their commercial intercourse was regulated. The most-favored-nation clause could be, it was seen, a most efficient instrument in promoting the desired end. As a simple distributive instrument, it would operate, in the unconditional form, by automatically extending whatever concessions might be made to one to other nations, to break down tariff walls gradually and without shock. Immediately all Europe set to remaking treaties, taking as a model for the new agreements the Cobden treaty. The chief characteristic of the new treaties was the insertion of the most-favored-nation clause, without exception, and in the unconditional form. The treaties were shorter than had previously been the rule, and their provisions were limited more strictly to the economic phases of commercial relations. We have mentioned elsewhere the English treaties which followed the Cobden treaty. Belgium at once made treaties (between 1860 and 1870) with France, Great Britain, Switzerland, Italy, Lübeck, Holland, Hamburg, Denmark, Norway-Sweden, the Zollverein, Austria, and Spain. Dr. Glier says of Belgium that it was the most determined champion of the

general and unconditional most-favored-nation treatment in all Europe. Italy was also enthusiastic, making treaties in the decade after 1860 with Sweden, France, Great Britain, the Zollverein, Austria, Switzerland and Spain. France made treaties with Belgium, Italy, the Zollverein, Spain, Austria, and Portugal. How the other nations of Europe followed suit may be seen by observing their names in the above groups.

Thus in the free-trade movement we find the use of the conditional clause practically given up. When the leading states of the Continent subsequently returned, after 1875, to the principles and practice of protection no return was made to the conditional clause in the treaties. That this return did not take place can best be explained by the fact of the adoption of "maximum-and-minimum" and "conventional" tariff systems, and the correlated use of the tariff-treaty. However that may be, Europe may be said to have definitely given up the conditional form of the clause in 1860, and since then, in spite of inconveniences which have been felt, European states have consistently employed the unconditional form and insisted upon the unconditional construction. They hold that all favors extended to third states are due at once and without return to states having favored-nation relations with the grantor state. It remains to be considered to what extent and with what modifications the first point may be accepted. With regard to the second, it must be conceded for the majority of European treaties which have been made since 1860. But a great mistake has been made by many governments and by many writers in that they have overlooked the historical setting which is essential, and, ignoring this, have attempted to extend what is a legitimate interpretation of a certain large group of treaties and to make that interpretation apply alike and at large to most-favored-nation treaties in general.

While European practice changed in the manner indicated, first from the unconditional to the conditional, and then back to the uniform use of the unconditional, the United States maintained, throughout, the form and construction of the conditional. South and Central American practice has varied. In some of the early South American treaties the unconditional form was

used. Treaties of Brazil and other states appear before 1827 in which only the negative side of favored-nation treatment was specified. Treaties made by the United States with Colombia, 1824, and with the Central American Confederation, Brazil and Mexico in 1825, 1828, and 1832, contained the conditional form, and from then on the leading American states embraced this principle. Their treaties with the United States have regularly contained this form. And between 1830 and 1860 they made no exception to this principle in their dealings with European states. Reciprocity was at the basis of their commercial policies. Their guarantee that "no higher or other duties" would be charged applied, as it has done in treaties of the United States, to the general tariff. For special concessions, equivalents were demanded in return. Since 1860 South American practice presents a tendency to waver between the two forms, in the way characteristic of European practice in the period preceding. Numerous treaties of Venezuela, Argentina, Paraguay, Uruguay, and Peru with European countries contain the unconditional form. This may be readily accounted for by the policies of the latter. Mexico has used chiefly the unconditional form of the clause. The practice of reciprocity has, however, held firmly in the treaties of American states *inter se*, and in a majority of those made with European, Asiatic, and African states.

Japanese practice, since Japan assumed a position of equality with western treaty-making nations, has varied. The Japanese have been accused of adopting that interpretation which seemed expedient, now giving favored-nation guarantees a qualified meaning and again calling for the unconditional construction. Considering the fact that Japanese treaties have contained both forms of the clause it is difficult to see how divergence could be avoided in the matter of interpretation. The Japanese treaty with Denmark, Oct. 19, 1895, article XIV, contains the words "immediately and unconditionally." The same form occurs in treaties made in 1896 with Germany, April 4; Belgium, June 22; Holland, Sept. 8, and Switzerland, Nov. 10. At the same time the conditional form appears in treaties made just previously, with the United States, Nov. 22, 1894; with Peru, March 20, 1895, and with Brazil, Nov. 5, 1895. The fact that these two

different forms were used by Japan would seem to indicate one of two things: either the parties with whom the Japanese were negotiating in each instance dictated the form in which the clause should be written into the treaty, using of course that which was common to their own practice, without its being pointed out to the Japanese or without their being aware that there existed a difference in interpretation—a thing altogether unlikely; or, the Japanese, recognizing the distinction, knowingly adopted the one form with some and the other with other nations, and have subsequently, quite logically and discriminatingly, used one interpretation in dealing with one set of nations and another in dealing with the rest. In either case, the fact that they have recognized the difference and acted accordingly, makes the charge that they have now one and now another interpretation assume the nature of a compliment to their clearness of vision. Their action is to be condemned only if instances can be shown in which they have varied in the interpretation of a single form of the clause, to their own advantage.

To summarize: The United States, both as regards form and interpretation, has been a regular adherent of the conditional usage, with a few exceptions. Great Britain has regularly adhered to the unconditional, with, likewise, a few exceptions. The countries of Europe followed first the unconditional, then the conditional, and then again the unconditional. Those countries which have had commercial policies smacking of free trade have shown a preference throughout for the unconditional, while those countries which have been most consistently protectionist, like Russia, have favored the conditional. South American states have used first the unconditional, then the conditional, and then both. Japan has used both, the choice being determined by the usage of the country with which she was in each case contracting. Other Asiatic countries, and Turkey among European nations, have, so far, had acquaintance chiefly with the unilateral, and therefore, unconditional, form, with the advantages in the favor of the other party. Two facts stand out prominently; first, that various periods have witnessed a decided shifting of emphasis in commercial policy; second, that favored-nation usage has varied with some, and remained practically

constant with other nations. A third fact of striking importance is, that with all the changing in tariff policy and treaty form, the most-favored-nation clause has not only not lost ground, but has steadily become a more and more regular feature of commercial treaties. In the latest extensive treaty-making movement, that which busied the countries of central Europe after the passing of the German Tariff Act in 1902, the clause was inserted in every one of the new agreements. At the beginning of 1908, Great Britain had most-favored agreements with no less than forty-six countries, the clause appeared in forty-five treaties of Italy, the United States and Germany had favored-nation treaties with more than thirty countries each, Spain, France, and Japan with between twenty and thirty each, and several other countries were not far behind.

CHAPTER VII

INTERPRETATION: OPINIONS OF TREATISE WRITERS AND RULES

With the most-favored-nation clause occurring so universally, under so widely differing conditions, in a variety of forms, and in a veritable network of treaties—and while such great importance has attached to tariff systems and their administration, it is not surprising that problems of interpretation have been both numerous and complex. Two schools of interpretation have arisen as indicated in the paragraphs introductory to the history of the clause. The adherents of one school hold to the strict or literal, perhaps the more truly juristic, interpretation; those of the other insist upon the practical, or—as it seems to some—opportunist, but surely more truly economic, interpretation. The former school, consisting of nations which lean toward the use of the simple reciprocal form of the clause, refuses to admit the distinction which the latter—as represented by the United States—maintains between favors *granted gratuitously* and advantages given expressly *in return for some compensation.*

The interpretation of the clause must necessarily depend to a considerable extent upon the form in which it appears. This suggests that, while emphasizing the importance of the historical survey in attempting to determine the meaning of a given clause, the value of the inductive method is not to be ignored. Our examination at this point requires using both. The *unilateral,* and the *specialized reciprocal,* forms (I and II)[1] offer little ground for misinterpretation, and need not detain us here. Much of the controversy has centered about the *simple recipro-*

[1] *Cf.* classification *supra,* chapter II.

cal form (III) in which the high contracting parties agree that in all that concerns navigation and commerce, favors which either grants to any third state shall be granted to the co-contractant. In the controversy are also involved the *imperative and unconditional* (IV) and the *conditional or qualified reciprocal* (V) forms. Form IV adds to the guarantee carried in form III, that favors granted to a third party shall "immediately and unconditionally" be extended to the co-contractant. Form V adds that the favor is to be extended to the co-contractant "freely if the concession to the third party was freely made, or for the like or an equivalent compensation if the grant was conditional."

Now, does form III imply that favors granted to a third party shall be extended *at once* and *without compensation* to the second? Looking at the wording of form III alone it might seem that the favored nation has the right to demand at once the concessions made to the third. But, we notice, form IV contains the word "immediately," which is lacking in form III. We notice likewise that form V contains an express stipulation for a "compensation," while form III contains no such stipulation. Is III then to be assumed to be "unconditional?" Here again, turning to form IV, we find the word "unconditionally." This word does not appear in form III. Are we then to assume from this that form III is conditional, in antithesis to form IV, or are we to hold it unconditional, in antithesis to form V? There is one escape from the difficulty here presented: we may assume that since form III makes no condition it is unconditional, and from that we will be led to the conclusion that the word "unconditionally" is inserted in form IV as a matter of extra caution and for the sake of clearness. Shall we then accept the same reasoning with regard to the word "immediately," giving forms III and IV essentially the same meaning? It is obvious that the mere discussion of terms will not carry us to a conclusion.

Turning to the history of the clause and to the early assertions which were made concerning its character and purpose, we find that its original function was not to secure advantages but to insure against discrimination, and we find special empha-

sis laid upon the fact that it operated to abolish, instead of creating, inequalities (which must include advantages as well as disadvantages) in the world's markets.[2]

Mr. Herod's "Most-Favored-Nation Treatment" contains an excellent discussion of the simple reciprocal form, and of the imperative and unconditional form, applying Hall's rules for the interpretation of treaties.

> 3. When the words of a treaty fail to yield a plain and reasonable sense, they should be interpreted in such of the following ways as may be appropriate:
>
> a. By recourse to the general sense and spirit of the treaty as shown by the context of the incomplete, ambiguous, or obscure passages, or by the provisions of the instrument as a whole.
>
> b. By taking a reasonable instead of the literal sense of the word when the two senses do not agree.
>
> 4. Whenever, or in so far as, a state does not contract itself out of its fundamental legal rights by express language, a treaty must be so construed as to give effect to those rights.[3]

We may well exhibit with these the following from among the rules which Wharton gives for the interpretation of treaties:

> (6) —— "interpretation" gives the meaning of particular terms to be explained by local circumstances and by the idioms which the framers of the treaty had in mind. (7) If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by the party accepting it.[4]

[2] "Nur auf die Gleichstellung mit den anderen fremden Staaten, nicht auf die Besserstellung gab die Meistbegünstigungsklausel ein Anrecht." Kaufmann, *op. cit.*, 342. " * * * cette clause, dont l'effet est de 'généraliser immédiatement chacune des concessions du tarif conventionnel' soit un acheminement, vers le régime du libre échange absolu pour qu'elle soit approuvée par les amis de la liberté." Pradier-Fodéré, Traité de droit international public, IV, 399. *Cf.* Visser, *op. cit.*, 78; Von Melle, *op. cit.*, 207; Herod, *op. cit.*, 15-16, and note; Cavaretta, *op. cit.*, 93; Fontana-Russo, Trattato di Politica Commerciale, 593.

[3] Hall, International Law, 5th Edition, 338-339.

[4] Wharton, International Law Digest, section 133, II, 36, citing other authorities.

Mr. Herod argues as follows: Examining the treaties containing the simple reciprocal form of the clause, we find that the reciprocity is the foundation of all.[5] This being the case, it is natural to infer that reciprocity should be considered as the "foundation for the general covering clause which is to supply omissions and prevent future unfavorable discriminations. This inference becomes a certainty when examined in the light of [Hall's] rule 4. A literal interpretation of the clauses would deprive a state bound by it of one of its important attributes of sovereignty," that is, it would become a bar to the state's making further arrangements upon terms of reciprocity with other nations. Such restrictions only follow upon the consent of a nation itself. Only the insertion of the words "immediately and unconditionally" or their equivalents can justify the assumption that a nation has so bound itself. "The stipulations of conventions governing commercial relations of nations are based upon utility and reciprocity. Gratuitous concessions, taken in a literal sense, are unknown."[6]

With regard to the immediate and unconditional form of the clause Mr. Herod says:

> It has been urged that the phrase "shall immediately be enjoyed" places the clause in the category of the imperative form, and secures any favor whatever in the subjects of which it treats gratuitously and without condition. Unless supported by some other strong evidence, the claim cannot be sustained. "Immediately" refers to the self-executing nature of the clause and not to the conditions of enjoyment.
>
> The clause embodying the phrase "without any consultation or delay" lies in the doubtful ground between the simple reciprocal and the imperative form.

To secure beyond question the interpretation of an imperative and unconditional clause, it is essential that it contain the

[5] "La réciprocité du traitement national et des avantages échangés est sans doute la base habituelle de cette sorte de traités; néanmoins on pourrait en citer dans lesquels les avantages respectivement stipulés sont loin de former un équivalent exact." Calvo, Droit international (Ed. 1896), III, 365-366.

[6] Herod, *op. cit.*, 9-12. See Am. St. Pap., For. Rel., V, 152, 890; I, 37; Whitney *v.* Robertson, 124 U. S. 190; 16 Op. Atty. Gen'l, 628.

words "unconditionally," "without equivalents," or the like.[7] In the light of our survey of favored-nation practice, certain qualifications may be suggested to some of these points. It is true that the principle of reciprocity is the foundation of commercial treaties, in that each party to a treaty aims to *get* something for what it *gives*. But the transaction may involve past present, or future favors. Agreeing in the inference that reciprocity should be considered as the "foundation for the covering clause"—it is still possible that if the treaty be regarded as a whole, the clause may be looked upon as guaranteeing an additional return, to whichever party may happen to profit by it, for the concessions which it has made in the text of the treaty. The giving of concession for concession, in the future, may or may not have been implied, according to the policy of the contracting parties. A literal interpretation becomes a bar to the making of further treaties upon a basis of reciprocity only in case the state bound is unwilling to generalize concessions made in subsequent treaties. Some states have avowedly and consistently opposed this practice, some followed a policy of making common to others the concessions which they make to one. Some states have done now the one and now the other. Mr. Herod's statement holds good for countries with a practice similar to that of the United States, but not for one in the position of Great Britain. Further, we see how that generalizing process is not only possible but highly practicable among states which have adopted the "conventional" tariff system, for there it is by means of this generalizing wrought by the most-favored-nation clause that the conventional schedule is made up. Again, the necessity for considering in what period a treaty was made becomes apparent. Without having done this, unconditional treatment may be read into a treaty which was really made under circumstances which warrant the assumption that the opposite was meant. It has been the tendency of late years for countries which formerly used the simple reciprocal form and which are avowed advocates of the unconditional interpretation to employ the fuller and more explicit form, IV, calling for the "immediate and unconditional" grant. This need not imply

[7] Herod, *op. cit.*, 28-30.

that their earlier treaties meant less than that, and it is reasonable to make the assumption suggested that this form is now used for extra caution. Yet we may well agree with Mr. Herod that "to secure *beyond question* the interpretation of an imperative and unconditional clause" this form should be used.

Nearly all writers discuss the question whether the provision of the most-favored-nation clause ought to include merely relations existing at the time of the conclusion of the treaty or ought to secure to the most-favored-nation a treatment equal to that of the nation at each and any moment the most favored, that is, whether the clause extends to favors granted in the future. Von Melle adopts the latter interpretation as essential.[8] Sig. Cavaretta cites De Cussy, Fiore, Heilborn, Ullmann, and De Martens as agreeing with Von Melle.[9] M. Visser defends that position vigorously. On the other hand, Hautefeuille holds that the clause applies only to favors existing at the moment of the making of the treaty.[10] Pradier-Fodéré takes this position.[11] Cavaretta cites Schiapparella as holding this opinion.[12] There have been inserted in many treaties express stipulations concerning "favors which shall be granted hereafter" or special provisions against future discrimination. These, it is argued, would be redundant if Von Melle's interpretation were accepted. M. Visser answers that the fact of the appearance of the express stipulation in certain treaties does not justify the argument that it forms thereby an exception to the general rule. One might as well argue, he says, that the persistent repetition of this provision in treaties containing a detailed elaboration of the clause

[8] "Die an sich mögliche Bestimmung, dass der andere Contrahent nur diejenigen Rechte haben solle, welche zur Zeit des Vertragsabschlusses der Meistbegünstigten Nation zustehen, scheint tatsächlich nicht vorzukommen und würde auch nicht unter den Begriff der Meistbegünstigungsklausel fallen. Für Letztere nämlich ist wesentlich, dass der durch sie Begünstigte zu jedem Zeitpunkt der Vertragsdauer mit der dann am meisten begünstigten Nation gleichgestellt ist. In manchen Verträgen ist ausdrücklich gesagt, dass das stipulirte Recht der Meistbegünstigung sich auf die Zukunft beziehen solle. Notwendig aber ist solcher Hinweis nicht, denn auch die ohne Zusatz vereinbarte Gleichstellung mit der meistbegünstigten Nation kann nur als eine Gleichstellung während der ganzen Vertragsdauer mit der jeweilig am günstigsten gestellten Nation verstanden werden." (Von Melle, *op. cit.*, 204.)

[9] Cavaretta, *op. cit.*, 89–90.

[10] Hautefeuille: Histoire des Origines, V, 2, 300, 301.

[11] Pradier-Fodéré, IV, 394.

[12] Cavaretta, *op. cit.*, 90.

is the proof of its general acceptance. Furthermore, treaties of commerce are meant to have and must have their effect on the future—why maintain that this one clause refers only to the present and the past? The clause, interpreted in this way, loses its greatest value. "Most-favored-nation treatment must mean treatment upon the footing of the nation most favored at any moment."[13]

As a matter of fact, the greatest value of the clause is not in what it obtains, favors present or future, but in what it prevents—discriminations; and there should also be recognized the distinction already pointed out between favors *gratuitously* granted and rights or privileges *purchased*. To Sig. Cavaretta, applying Hall's rules for interpretation, it appears evident that by virtue of the words pure and simple, "there is granted the most-favored-nation treatment," the conceding state simply intends to extend to the other contractant all the advantages already accorded to any other power without referring to any advantages which may be accorded in the future. There is no need to maintain that the concession of future advantages is a constituent element in the clause, which, interpreted in such manner, would rob the conceding state of one of its most important attributes of sovereignty by restricting its liberty of action.[14] M. Visser recognizes no examples where practice has followed the other, or "limited-to-the-present," system.[15] But surely the chief complaint which European nations have made against the application made by the United States of the clause has been that the latter refuses to consider subsequent arrangements with third parties upon a reciprocal basis as affecting its most-favored-nation obligations toward original co-contractants. If this be not an example where practice follows the other system, where can we expect to find an example! Granting that the practice of the United States is based on the distinction between the *kinds* rather than the *times* of the concessions, this does not alter the fact and the character of that practice. This suggests again a difference between favors freely granted and

[13] Visser, *op. cit.*, 83.
[14] Cavaretta, *op. cit.*, 91-92.
[15] Visser, *op. cit.*, 83.

favors extended in return for a compensation. Yet it is conceded even in the practice of the United States that the former extend immediately or upon demand to such nations as possess most-favored-nation treaties.

When the second party to a treaty comes into the enjoyment of some advantage from the operation of a treaty by which the first party grants some advantage to a third, what becomes of the newly acquired right in case the treaty between the first and third parties is subsequently withdrawn? A distinction must be made between cases where such right has accrued to the second party merely as a matter of course, and those where there has been a special correspondence between the first and second governments, granting this new right to the latter. Lehr suggests that the right may have become an integral part of the conventional law between the two powers, which, although growing out of the original treaty, has become independent of both the treaty and the most-favored-nation clause. Even so, if the second nation has not taken the trouble to secure a direct recognition of such right, it can not expect that it will continue after the removal of the original grant.[16] Visser and Cavaretta agree with this. For the advantages thus acquired, the second party has given nothing in return, and to allow these to continue would make them more durable than rights which have been gained by express stipulation. If, however, the formalities have been complied with and the right recognized, Lehr holds that the favored treatment should continue so long as the original most-favored-nation treaty between the first and second powers remains in force. To this, M. Visser (pp. 84–86), Mr. Herod (pp. 31–32), and Sig. Cavaretta (pp. 172–174) do not assent. M. Visser argues, on the basis of *cessante causa cessat effectus,* that the new treaty with the third power having been abrogated, the foundation of the right no longer exists. Mr. Herod expands and illustrates the same principle, maintaining that the favors in question, though offshoots of the original concession, yet remain subordinate to it, and that, under any other interpretation, the second nation would be securing *gratis* a new favor,

[16] Lehr, *op. cit.*, 313 ff.

thus making it more favored than the most-favored-nation.[17] Such was the position held in determining the question which arose over the application of article IV of the treaty of July 17, 1858, between the United States and Belgium.[18] In case the first and second powers have made a specific arrangement concerning the favors in question, so formal as to amount to a treaty, the new arrangement comes entirely within the operation of the clause.

> This rule does not apply to vested rights and interests. The abrogation, suspension, or termination of a treaty or any part of it by which vested rights were secured will in no wise impair or destroy them.[19]

This matter having been settled, another question arises: whether, when two nations agree upon the interpretation of a treaty between them, a third can, pleading its most-favored-nation clause, oppose itself to that interpretation, provided it can show such interpretation to be wrong. M. Visser argues, with Schraut, that it can not, while Von Melle affirms that it may.[20] To answer this question it would be necessary first to decide what would constitute a proof by a third party

[17] Herod, *op. cit.*, 31-32.

[18] "La pratique suit toujours le système suivant lequel, aussitôt les traités contenant les avantages spéciaux devenus caducs, des tiers ne peuvent plus jouir de ces avantages par la voie du traitement de la nation la plus favorisée. Un exemple s'offre encore une fois dans l'article 11 du traité de Francfort. Pendant toute la durée de ce traité, les parties contractantes ne se sont jamais opposées à ce que des avantages, résultant de la clause de la nation la plus favorisée, disparussent en même temps que les traités dans lesquels ils étaient stipulés." (Visser, *op. cit.*, 86.)

[19] Herod, *op. cit.*, 32.

[20] "Et les contractants seuls peuvent décider si, et jusqu'a quel point, les avantages en question existent réellement. Il serait donc trop étrange si, deux états étant d'accord sur les droits découlant pour eux d'un certain traité, un tiers, qui est étranger à ce traité, intervenait et imposait aux contractants des droits autres ou plus puissants qu'ils ne le desirent eux-mêmes." Visser, *op. cit.*, 87.) "Doch wird sich nicht, wie Schraut meint, mit Recht behaupten lassen, dass * * * 'dritte Staaten auf Grund ihres Meistbegünstigungsrechtes eine anderweitige Auslegung oder Handhabung in der Regel selbst dann nicht beanspruchen können, wenn die Berechtigung ihrer Auffassung der fraglichen Vertragsbestimmung nicht bestritten werden kann.' Vielmehr wird ein vertragsmässig eingeräumtes Recht seinem ganzen Umfange nach bis zu einer ausdrücklichen Vereinbarung über seine Aufhebung oder Aenderung als bestehende, in Folge einer Meistbegünstigungsklausel auch von dritten Staaten zu beanspruchende Vergünstigung aufgefasst werden müssen." (Von Melle, *op. cit.*, 204-205.)

that the interpretation of their own treaty by the two contractants is "wrong." What may satisfy a third party is very unlikely to be satisfactory to the first and second, and the "proof" is not likely to be conclusive. Surely, under the rules for interpreting treaties, there can be little ground for difference of opinion other than as it may hinge upon peculiarities in the circumstances under which one or both treaties were made. It would seem almost incontrovertible that the interpretation to which the makers of a treaty agree shall, as regards that treaty, govern their relations, and be final.[21]

What effect will the abrogation of a treaty by one party without the consent of the other have upon the most-favored-nation treaty of a third? It is frequently provided in a treaty that it may be abrogated by either nation, or that after a given time, it may be abrogated upon a given notice. If there is no provision in the treaty, and if a treaty is to exist for a specified time, the unilateral denunciation should have no effect before the end of the specified period. Suppose, however, a country breaks a treaty, even of this sort, and in violation of what seem to be the principles of international law. There is no remedy except that of war for the second party. What becomes of the most-favored-nation rights of a third party? Apparently they will fail, just as though the treaty had been regularly abrogated.

Suppose after two nations have made a treaty on the basis of the most-favored-nation, one, through war or otherwise, loses a part of the territory within which the other enjoyed special privileges. Can the other nation claim a continuance of this most-favored-nation treatment within that territory? The doctrine of *res transit cum suo honore* might seem to imply that the obligation should continue. To apply this, however, is to overlook the distinction between obligations *real* and obligations *personal* as they appertain to a state. The obligations of alliance, friendship, commerce, navigation, extradition, and in general the *personal* relations of a ceding state do not follow the ceded

[21] "Le traité pourtant dont on dérive, au moyen de la clause, le droit en question existe seulement en vertu de la volonté des deux contractants et en dépend. En général, un troisième état n'a rien à faire avec ce traité et ne peut exercer aucune influence sur son application." (Visser, *op. cit.*, 87.) *Cf.* Hall's International Law, 5th Ed., Part 2, Chapter 10.

property. The third power can not, through the application of the most-favored-nation clause, continue to enjoy such rights in the ceded or withdrawn territory.[22]

In taking up the conditional clause M. Visser points out that a distinction—which has ordinarily been overlooked—must be recognized between two forms in which it occurs. The condition may be either (1) where a special condition must be fulfilled in order to give birth to the right to favored-nation treatment—for instance one in which the duty on certain goods is lowered if imported directly from the country of the origin; or (2) one in which an equivalent is specified for, the favored interest and the condition being separate, one state merely giving the other certain privileges on the general understanding that the latter will give certain privileges in return. In the former case, the second nation can only claim the favor granted to a third by the first upon fulfilling the same specified condition. There can be no charge of discrimination if the conditions can not be duplicated. Cases occur where particular tariffs are accorded to merchandise imported by a certain route or in a certain way, and where special circumstances govern the importation of raw material, merchandise sent to fairs, petty neighborhood transactions in live stock and produce, and border-commerce generally. These things are usually arranged for in treaties. As a rule contiguous states alone enjoy the benefit of such stipulations, other nations being unable to fulfill the conditions. Schraut* is of the opinion that the clause of the most-favored-nation does not apply to such transactions. Von Melle† and Visser‡ hold that treaties should so specify if these things are to be excepted, that is, that the clause should apply. The fact that in many treaties special provision is made to cover these cases, would seem to support this view. Yet the fact that on account of contiguity, political relations, etc., this exceptional treatment prevails in many cases without such specification makes it impossible to lay this down as a general rule.

Supporters of the limited interpretation of the clause claim

[22] See Cavaretta, *op. cit.*, 181-182.
* *Op. cit.*, 91.
† *Op. cit.*, 236.
‡ *Op. cit.*, 162.

for the interpretation of the conditional clause, in the second form as well as the first, that all are treated on a footing of equality if all *may* obtain the same advantages by fulfilling a like condition, that is, that the demand for compensation does not constitute an infringement of the clause. This view, says M. Visser, can be held only by those who lose sight of the distinction between the two forms of the condition.[23] Von Melle likewise accepts this view.[24] This is nothing more than repeating that these writers hold to the unconditional and literal—more than literal, in fact—interpretation. The distinction between the two kinds of conditions is sound, but the recognition of it does not inevitably lead to the acceptation of M. Visser's conclusion. Von Melle held M. Visser's opinion concerning both, without—as M. Visser points out—apparently having noticed the distinction between the two. Now, having the difference pointed out, we are as far from accepting M. Visser's subsequent line of reasoning as we would be if we failed to recognize the distinction. In addition to the exceptions to that position indicated elsewhere in this paper, little can be added here other than to deny that it "makes no difference on what conditions the first state has made a treaty with a third" and that "it is a matter of no difference to other [second] states whether this transaction be called a 'favor' or 'reciprocity.'"[25] That it *does* make a difference to the first state whether its concession to a third is freely given ("favor") or granted for a return ("reciprocity") is incontestable. That it should—and in fact

[23] "Par la clause de la nation la plus favorisée, un état stipule dans un traité le droit que ses intérêts jouiront dans le territoire du cocontractant d'un traitement égal à celui de tout autre état. * * *L'état qui s'appuie sur cette clause n'a rien à faire avec les conditions imposées à des tiers par son cocontractant, tandis que celui-ci ne peut pas en appeler contre le premier état à la convention conclue avec un tiers. A l'égard de ce premier état, cette convention est une *res inter alios* dont il ne fait pas partie et qui ne peut ni lui imposer des obligations ni modifier ses droits. Cette convention ne peut donc pas voiler le droit du premier état de participer dans le domaine de son cocontractant à tous les avantages dont les autres jouissent *jure aut facto*. Donc aussitôt que, par l'accomplissement de la condition, un troisième état a obtenu un traitement favorisé pour certains de ses intérêts, ce traitement tombe dans le domaine de la clause de la nation la plus favorisée, lorsque celle-ci s'applique bien entendu à des intérêts semblables." (Visser, *op. cit.*, 163-164.)

[24] Von Melle, *op. cit.*, 205-206.

[25] Visser, *op. cit.*, 273.

does—make a very real difference to a second state follows from the fact that "favors," "freely given", to a third are not in practice denied it and only in case they were refused could it claim that it was being discriminated against to the advantage of the "more-favored" third state; while, in case of reciprocity between the first and third states, it becomes a question answerable often only by experience, whether one or the other nation is more-favored. M. Visser refuses to distinguish between the transactions to which the terms are respectively applied. Moreover, even though there may be ground for arguing that the *unqualified* clause guarantees the co-contractant a "treatment in no respect less-favored than that of any other state," it is altogether too much to make the same claim for the *qualified and conditional form*, and the best that should be claimed for the latter is that it should act as a guarantee and a prohibition against the second nation being denied the opportunity to make an equivalent concession whereby it may obtain any advantage granted a third. We are therefore obliged to take exception to M. Visser's attitude on this point.

A question which has brought the clause into more prominence than any other of late years, and which has affected English tariff policy as perhaps no other, is that of countervailing duties. The "bounty" has been characterized as an attempt by the exporting country to render illusory the protective duties levied by importing countries. The definition is incorrect, in a sense, inasmuch as the bounty is paid just the same upon articles exported to countries which levy no duty as upon those exported to countries which have a protective tariff. It is, however, very suggestive of the purpose and effect of the bounty in some cases.

The right to levy countervailing duties has been successfully defended on economic grounds. Can it be as conclusively defended on legal grounds? Are countervailing duties compatible with the most-favored-nation clause? As the question has been raised chiefly with regard to sugar, and as the sugar controversy illustrates its chief points, we may limit the consideration to certain phases of that subject.[26]

[26] Space forbids reviewing here the history of the sugar bounties and countervailing duties. For brief résumé, see Visser, *op. cit.*, 165–176. For more complete history and fuller discussion, Kaufmann, *op. cit.*, Chaps. III, IV, V.

In 1874, Great Britain removed entirely the tariff on sugar. The manufacturers of chocolate, marmalade and other sugar products prospered immensely, but the sugar-producing British colonies suffered at once. Consequently they and the English sugar refiners petitioned for a countervailing duty against the bounty-fed sugars of the Continent. Since that time the question has occupied a very important place in politico-economic controversy. In 1880, the British law officers declared countervailing duties incompatible with the most-favored-nation clause. In spite of agitation in 1881 and in 1884, the government, though recognizing the importance of protection against European sugar, felt that it would be impossible to use these duties while the treaties were in force. In 1888, representatives of Holland, England, Germany, Austria, Belgium, Spain, Italy, and Russia signed the Sugar Convention, which provided that each country should exclude bountied sugar. Of the discussions, and the attitude of the powers at that time, M. Visser says: "We can not deduce from the act of the conference a general recognition of the principle that the clause of the most-favored-nation permits the application of countervailing duties. Besides, the convention was not ratified."[27] It seems that the British foreign office even then feared that the clause in their treaties would prevent their adherence to the convention.[28] Denmark appears to have refused for the same reason to sign the convention.

In 1889, however, the new Conservative ministry advocated legislation to forbid the importation of bountied sugar. In 1897 was formed the Anti-Bounty League. Under the Tariff Amendment Act of March 20, 1899, countervailing duties equal to the foreign bounties were laid on sugar imported into India. The House of Commons voted to give the government a free hand for further measures which might be necessary for the protection of British-Indian sugar industries.[29] This levying of countervailing duties to neutralize sugar bounties has been characterized as "the first step toward reversing the free-trade policy."

[27] Visser, *op. cit.*, 169.
[28] Kaufmann, *op. cit.*, 295.
[29] Kaufmann, *op. cit.*, 292.

In correspondence with Russia in 1899, the British foreign office declared these duties no violation of the most-favored-nation clause. Lord Salisbury held that the Russian system of repaying excise duties on sugar in case of exportation had the same effect as a "bounty of a more direct nature;" that it was the intention of the most-favored-nation clause that goods shall enjoy equality of treatment, but not preferential advantages; that when an artificial preference was produced by the direct legislative act of one party to a most-favored-nation agreement, the other government might "redress the balance of trade which had thus been artificially disturbed" by discontinuing the bounty or the legislative act producing the official stimulus.[30] The same position was taken by the Foreign Office and the British representatives at the Brussels Sugar Convention and by Lord Cranbourne, Mr. Balfour, and Lord Lansdowne in 1902. Lord Lansdowne even offered to abrogate the Russian treaty.[31]

In 1894, under the Wilson Act, the United States laid countervailing duties on bountied sugar. Germany objected, especially on the grounds that bounties are purely a domestic affair of the exporting nation, and do not therefore affect the importing country, and that the attitude of the United States would render the effects of the most-favored-nation clause illusory by subjecting the exporting party to arbitrary duties which it was the object of the clause to prevent. Secretary Gresham held that the act was in violation of the treaty obligations of the United States,[32] and President Cleveland recommended but did not secure the repeal of the portion of the statute imposing the duty.[33]

In 1897, Congress passed the Dingley Tariff Act, among whose provisions was one whereby an additional duty equal to the

[30] Note to the Russian government, July 15, 1899, Parl. Pap. Commercial No. 1 (1903). See Moore, *op. cit.*, V, 307.

[31] Moore, *op. cit.*, V, 309.

[32] The additional duty, therefore, levied by the acts of 1894 on all sugars coming from bounty-paying countries is not responsive to any measure that may be considered as constituting a discrimination by these countries against the production or manufactures of the United States, but is itself a discrimination against the produce or manufactures of such countries. It is an attempt to offset a domestic favor or encouragement to a certain industry by the very means forbidden by the treaty. Sec. Mr. Gresham to Pres. Cleveland, Oct. 12, 1894. U. S. For. Rel., 1894, 239.

[33] Cleveland's message, Dec. 3, 1894.

net amount of the bounty was to be levied on bounty-fed articles (Sec. 5). The European protests of 1894 were repeated. Russia, Germany, and Austria-Hungary especially, claimed that these duties violated treaty rights. Secretary Olney, abandoning the attitude assumed by Secretary Gresham three years before, denied the validity of their contentions, arguing:

1. The most-favored-nation clause can not interfere with international regulations.

2. The tariff is a statute enacted later than the conclusion of the treaty, and so far as inconsistent with it is controlling.

3. Representatives, not only of Great Britain, but of Germany as well, had expressly declared at the conference of 1888 that the export sugar bounty of a country might be counteracted by the import sugar duty of another without causing any discrimination which could be deemed a violation of the terms of the most-favored-nation clause.[34]

By the Brussels Sugar Convention of March 5, 1902, the signatory powers, Great Britain, Germany, Austria-Hungary, France, Belgium, Holland, Italy, Spain, and Sweden, agreed to prohibit the importation into their territories of bounty-fed sugar. Russia, not having been a party to this convention, subsequently protested vigorously against the countervailing duties imposed by the United States and England. Both these powers, however, maintained not only the necessity for, but the legality of these duties,[35] and the Sugar Commission declared that the means employed by the Russian government to encourage the cultivation and exportation of sugar constitutes bounty-feeding. Russia signed the Sugar Convention in December, 1907.

[34] Mr. Olney, Nov. 13, 1894, 21 Op. 80, 82; Moore, *op. cit.*, V. 306. Mr. Sherman to Mr. von Reichenau, Sept. 22, 1897. U. S. For. Rel., 1897, 178.

[35] Where a tax is imposed on all sugar produced, but is remitted on all sugar exported, and the exporter obtains from his government solely by reason of such exportation a certificate, which has an actual value and is salable in the open market, the remission of the tax is in effect a bounty which subjects the sugar, on its importation into the United States, to an additional duty equal to the entire amount of the bounty, according to the act of Congress, July 24, 1897, 30 Stat. at L. 205. Downs *v.* U. S. (1903), 187 U. S. 496. "Nach den Bemerkungen Lord Cranbourne's und Balfour's, * * * 1902, scheint auch ein neues Rechtgutachten der jetztigen Britischen *law officers* vorzuliegen, welches sich in dem gleichen Sinne geäussert hat." (Kaufmann, *op. cit.*, 297.)

The argument in justification of the duties in their relation to the most-favored-nation clause is, that if the importing country accepts all sugars on equal terms, this constitutes a discrimination against countries which pay no bounties and those which pay less than the highest, to the advantage of those countries which pay the highest, and that this is contrary to the spirit of the clause. M. Visser argues, in agreement with Mr. Gresham, that it should make no difference to the importing country what were the conditions of exportation, as only the way in which articles enter its ports concerns it; further, that, the purpose of the clause being to prevent arbitrary discrimination, a nation has no right to make arbitrary classifications; that we might as well discriminate between monarchies and republics as between bounty-paying and non-bounty-paying countries; that the bounty system is, like the protective system, merely a matter of internal policy; and that the application of countervailing duties constitutes an interference with the internal legislation of the exporting country.[36]

He recognized[37] (writing in 1902) that the duties were being used more and more, but attributed this to economic, not at all to juristic, causes.

> "La compatibilité des droits compensateurs avec la clause * * * n'étant pas soutenable, il faut s'étonner que ce système fasse encore tant de progrès. Seule la politique économique en est cause." States wish to do away with bounties, but cannot do so on account of lack of unanimity. Countervailing duties work toward this end. In effecting this object, many states have had too little regard for the juristic side and the legal questions involved.[38]

Kaufmann, on the other hand, cites a long list of opinions sustaining the legality and justice of the duties.[39] He himself takes

[36] Visser, *op cit.*, 174–176.

[37] "* * * la pratique est douteuse. Les états ne diffèrent pas seulement entre eux en ce qui concerne la compatibilité des droits avec la clause dont nous traitons, mais aussi la manière d'agir des différents états se modifie dans un court espace de temps dans l'un ou l'autre sens. On ne peut donc certainement pas parler d'une reconnaissance générale. Nous n'hésitons pas à soutenir l'incompatibilité de ces droits avec la clause * * *." Visser, *op. cit.*, 172.

[38] Visser, *op. cit.*, 176–177.

[39] Kaufmann, *op. cit.*, 298–309.

the view that the most-favored-nation clause does not forbid countervailing duties, but forbids only a fixed countervailing duty determined upon the basis of the highest export bounty paid, which would be manifestly unfair to other bounty-payers who pay less.[40]

If political economy is—as M. Visser points out—the cause, and if a legitimate object, the doing away with commercial inequalities, is to be attained, surely the most-favored-nation clause ought not be invoked to forbid these countervailing duties—for the clause owes its existence, if not its origin, to practical economic necessities; it has been a most potent instrument in the struggle for commercial equality, and the highest value set upon it by friends and enemies alike has been its power to level artificial inequalities and maintain commercial equilibrium.

International law has not yet become so established that it may be cited as either affirming or denying the right in question; whatever appears the more practical and equitable interpretation will become the law. At present, economic interests, the equities involved, and the tendency of international opinion (witness the Brussels Sugar Convention) certainly favor the attitude assumed by the United States and Great Britain.

Mr. Herod (Chapters VI–X) considers in detail many cases, from which he draws conclusions which we may conveniently group and consider as a body of quasi-rules, for most-favored-nation treatment. Omitting the discussion, we would cite as among the more important of these, the following:

1. The general form of the most-favored-nation clause, or the more limited form specifying "no other or higher duties" requires that duties on imports and exports shall be uniform and collected without any unfair discrimination against the products of the contracting state. (pp. 57–8.)

[40] "Entsprechende Gegenmassnahmen gegen Prämien sind keine Verletzung vertragsmässig gewährter Meistbegünstigung und sind eventuell Pflicht mit Rücksicht auf meistbegünstigte dritte Staaten." (Kaufmann, *op. cit.*, 338.) "Der materiellen Auffassung der Meistbegünstigungsklausel entsprach daher bei verschiedener Höhe der fremden Prämien nicht ein einziger gleichmässiger Ausgleichzoll, sondern verschieden hohe Ausgleichzölle je nach der verschiedenen Höhe der fremden Prämien. " (*Ibid*, 280.) On the policy of the United States, compare *Ibid*, 274-280. On the policy of England, *Ibid*, 280-302. Mr. Herod considers the duties both equitable and legal. Herod, *op. cit.*, 121.

2. The equality of duties applies to the time at which they are levied as well as to their amount. (p. 60.)

3. Silence on the part of the legislature under its sovereign powers, to regulate commerce, implies that that branch of commerce on which no expression is given is to be free. (pp. 62–3.)

4. It does not concern one state that the articles of commerce of another are taxed or free of duty, provided that the enforcement of the legislation governing their taxation in no way discriminates against its own articles of commerce. (pp. 63–4.)

5. A state will not be acquitted of a charge of unfair and unequal discrimination if it extends a gratuitous favor to the products of a particular geographical district which may or may not contain organized states and refuses it to nations which are entitled to the same treatment under the most-favored-nation clause. (p. 70.)

6. A regulation which relieves the importer of goods of a country from any charge on the transaction necessary to bring the goods to the seller must be extended upon equal terms to the importers of the goods of those nations which enjoy the privileges of the most-favored-nation. (p. 77.)

7. Where a tonnage tax is national in character, and a favor is extended by one nation to the vessels of another, the same favor upon terms of reciprocity should be readily granted to the vessels of all other nations enjoying the privileges of most-favored-nation treatment. (p. 82.)

8. A nation enjoying the privileges of most-favored-nation treatment in matters of commerce can justly claim, upon terms of reciprocity, rates as low as those extended under like conditions to any other nation. This applies to railroad rates, telegraph, telephone, post, bills of lading, etc. (pp. 102–5.)

9. A tax upon a bounty product, equal to the unnatural advantages which it enjoys, is justifiable. (p. 121.)

10. The general clause of the most-favored-nation does not comprehend special engagements of reciprocity. (p. 112.)

11. In questions of considerations—the sum of the concessions on one side must be taken as the consideration for the total of the favors obtained from the other party. (p. 113.)

12. Where a state has by a special treaty of reciprocity granted favors in matters of commerce and navigation, it should in justice grant to every other power with which it has treaty relations an opportunity by negotiation to arrive at what would be a fair equivalent for the favors extended by the special treaty. (p. 113.)

13. When there is withheld from a nation or its citizens any privilege, favor, or immunity to which, by operation of the clause, it or they are entitled, a claim for damages, if actual damages have been suffered, is not barred by the statute of limitations, on the theory that "where a treaty is made between two independent powers, its stipulations cannot be deferred, modified, or impaired by the action of one party without the assent of the other. If the parties, by their joint act, have established no barrier in point of time to the preservation of any treaty made by them, then neither country can interpose such limit." (pp. 33–4.) If the discrimination has taken the form of an actual money tax or loss of property the claim for restitution will rightly carry with it interest upon the amount unjustly levied when such tax has been paid under protest.

14. Where the constitution or practice of a state gives equal weight to laws and treaties and makes that which is of latest date repeal others, the courts, following the constitutional rules, are obliged to sustain a law, even though it operates to deny rights guaranteed by a treaty concluded previous to the passing of the law. This does not, however, according to the law of nations, weaken the treaty obligations of a nation, and a state remains in honor bound to carry out the stipulations of its treaties. A breach in treaty obligations renders a state committing it liable in international law and in equity to the injured party. (pp. 34–5.)

We may add to this:

15. As between two treaties which two different have with a third, and which are in conflict, that of o prevails.[41]

[41] Hall: International Law, 342; Bluntschli: Le droit internati 3d ed., 414. Mr. Herod also suggests—but this can not be looked expression of practice—that it seems only fair that a nation wh the policy of free trade imposes no duties on exports, should b favored nation treatment to all the benefits of a treaty of founded solely upon mutual conditions in exchange of articles for she has not only conceded the equivalents, but has done so of such nations as have bought the favor. (*Op. cit.*, 118.)

CHAPTER VIII

GERMANY AND THE UNITED STATES: MOST-FAVORED-NATION RELATIONS

Probably no single treaty containing the most-favored-nation clause has caused more controversy than that made between the United States and Prussia, May 1, 1828. Certainly none has attracted more attention from individuals and bodies other than ministerial. This being the case, and since this controversy and its issue illustrate, in a variety of phases common to no other single instance, the necessity for careful application of certain of the principles and methods of interpretation indicated, it will be profitable to study the history of German American most-favored-nation relations in some detail.

The treaty of 1828 contains sixteen articles, reviving article XII of the treaty of 1785 and articles XIII–XXIV of the treaty of 1799. Those about which controversy has centered are articles V and IX.

> Art. V. No higher or other duties shall be imposed [on the importation into either of products of the other], than are or shall be payable on the like article being the produce or the manufacture of any other foreign country. Nor shall any prohibition be imposed on the importation or exportation of any article the produce or manufacture of [either, to or from ports of the other], which shall not equally extend to all other nations.
>
> Art. IX. If either party shall hereafter grant to any other nation any particular favor in navigation or commerce it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional.

These two articles are practically identical with articles V and

IX of the Austrian treaty with the United States, Aug. 27, 1829, and articles VI and XI of the Russo-American treaty of Dec. 18, 1832.

As indicated above, it has been the view of the German government, put forward repeatedly, that this treaty calls for unconditional most-favored-nation treatment, and that article V is not to be considered as modified by article IX. The American government, on the other hand, has regularly maintained that, while it was the meaning of the treaty that the commerce of the two nations be put on an absolute equality as to favors granted to other nations *pro praeterito,* article IX excludes unconditional most-favored-nation treatment *pro futuro,* and that articles V and IX must be read together. In other words American diplomats have maintained, concerning this treaty, what they have maintained concerning all, that it was not, and has not been, our policy to make unconditional most-favored-nation agreements, but that all are based on reciprocity.

In order to determine which has been right, it is necessary, as Dr. Glier points out, to consider the circumstances under which the treaty was made and the meaning of similar wording in similar treaties of that period, rather than to depend on the modern arguments presented by the two governments respectively, which invariably start from different premises. What, then, was the understanding at the time the treaty was made? The résumé given in the discussion of United States practice under the subject "The History of the Clause" leaves no possibility for doubt as to the usual practice of the United States. Three cases occur where the United States has deviated from that course, and has made what cannot but be interpreted as unconditional promises. In the Swiss treaty of 1858, article X reads:

> In order the more effectively to attain the object contemplated in article VIII [most-favored-nation treatment] each of the contracting parties hereby engages not to grant any favor in commerce to any nation * * * (etc.), * * * which shall not immediately be enjoyed by the other party.[1]

[1] This clause is no longer in force.

In the treaty with the Orange Free-State, Dec. 22, 1871, article VII reads:

> Each * * * hereby agrees not to grant any favor in commerce to any nation, which shall not immediately be enjoyed by the other party.[2]

In the treaty with Servia, Oct. 14, 1881, article V:

> Neither * * * shall establish a prohibition of importation, exportation, or transit against the other which shall not be applicable at the same time to all other nations.

And article VI:

> * * * also every favor or immunity [concerning importation, exportation, etc.], which shall be later granted to a third power shall be immediately extended, and without condition, and by this very fact, to the other contracting party.[3]

There are no such promises of immediate or unconditional extension of favors in the Prussian treaty of 1828. Clearly it cannot come in that group.

There are, further, at least five United States treaties[4] for which the suggestion might be made, since they do not contain the stipulation for compensation, that they constitute engagements for unconditional most-favored-nation treatment.

These treaties contain such articles as the following:

> No higher or other duties [shall be imposed on importation or exportation to or from either * * * from or to the other] and no prohibition [shall be imposed] which shall not extend equally to all other nations.

They do not contain elsewhere the clause requiring compensation. The United States government, however, not only recognizes no unconditional interpretation and no generalization of tariff concessions but it has held that, even where the compensatory clause is omitted, it is to be understood. We may without hesitation accept Dr. Glier's conclusions that none of this second group contemplate unconditional most-favored-nation treatment.

[2] This treaty lost effect when the Orange Free-State was absorbed into the British Empire.

[3] See also Art. XIII. This treaty is still in force.

[4] With the Netherlands, Oct. 8, 1782,—Great Britain, Nov. 19, 1794,—France, Sept. 30, 1800,—Great Britain, July 3, 1815,—Hanover, May 20, 1840.

But, even if these could be added—which they cannot—to the three which are conceded to have contained the unconditional promise, thus making a significant number of exceptions to the general American practice, the Prussian treaty does not fall within that number, but belongs to the group in which the majority of United States treaties fall, that is, among those containing the compensation clause.

That the American intention in general in making treaties in this latter form has been to apply the conditional treatment cannot be denied. A glance at the correspondence of our secretaries of state makes this point incontrovertible. What then may have been the intention at the time of the making of this particular treaty? In 1823 Mr. Gallatin had stated explicitly that the United States idea of most-favored-nation treatment was on the basis of equivalent compensation. In the year following, 1824, the United States made the treaty with Colombia which introduced the reciprocity principle to South American states. In the matter of tariff policy, the movement toward protection which began in 1816 and set in strongly after 1819, had "reached its highest point in 1828."[5] In 1828 came the treaty in question, with Prussia. In 1829, Aug. 29, we made a similar treaty with Austria. An opportunity was presented almost at once for our government to declare its position concerning the meaning of this treaty. The opinion which was delivered leaves little to be desired in the explicitness with which it lays down the American view. To the Austrian request for reductions on wines similar to those given France under the treaty of 1831, Mr. Livingston replied, in 1832, that it could not be imagined that either party intended to forego the advantages which might be derived subsequently from contracts with other nations for "equivalent reductions." Further, he declared that article V and article IX must be read together, that there was no contradiction between these articles, that article IX confirmed article V, and that the two together meant that if duties were lessened in favor of a third nation the second should obtain like reductions for an equivalent.[6] Again, in 1831, came our contention with France

[5] Taussig: Tariff History of the United States.
[6] See Livingston's Note to Lederer, Nov. 5, 1832. Moore, *op. cit.*, V, 261.

over the treaty of 1803, in which our secretary of state strenuously denied, quoting also from his predecessors, that the United States had made an unconditional, most-favored-nation treaty with France. Is it likely that if the United States had had unconditional most-favored-nation treatment in mind in making the treaty in 1828, it would in 1831 have denied ever having entertained notions of that practice? Would the United States in making a treaty with Russia in 1832 have employed again the same words used in the treaty with Prussia in 1828 and in that with Austria in 1829, had it not considered that its declaration in 1831 established its position as to the meaning of its most-favored-nation stipulations?

The evidence leaves no doubt as to what was the attitude and understanding of the United States when the treaty of 1828 was made. The Americans had in mind conditional most-favored-nation treatment. What, then, was the idea of the Prussians?

Dr. Glier, having shown, as we have indicated elsewwhere, that the principle of reciprocity was widely in vogue during this period, and that the conditional form of the clause, in what are plainly reciprocity treaties, was of very frequent appearance, exhibits eighteen treaties of German states with American countries for the period between 1825 and 1860 concerning which he asserts that not one stipulates for unconditional most-favored-nation treatment.[7]

The United States had, previous to 1828, made two treaties with Prussia, one in 1785 and the other in 1799. It had been the policy of Prussia during and after the American revolution—a policy begun by Frederick the Great—to allow merchants of the United States coming to Prussian ports to "enjoy complete freedom and be treated with all the consideration given merchants of other lands." The years 1828 and 1834 witnessed a wide extension among German states of the policy of removing internal trade barriers, while at the same time new customs duties were established on the frontier of the Zollverein, duties which were to constitute a "protective barrier against foreign competition." Prussia was then, in 1828, a follower of protective tariff policy.[8]

[7] Glier, *op. cit.*, 81.

[8] *Cf.* Worobkiewicz: Zur Handelsvertragspolitik, 23.

Now, the treaty with the United States of 1828 was meant to put the commerce of the two nations "on a basis of absolute freedom," but this surely did not imply free trade. No more did it imply unconditional most-favored-nation treatment. Both countries were followers of the principle of reciprocity. Both were using a protective tariff. From 1828 to 1860 Prussia was numbered among the "vigorous opponents of unconditional most-favored-nation treatment." The reciprocity principle appears clearly in article IX of the treaty of 1828. Both before and for a long time after, Prussia as well as other German states had distinguished between a restricted and an unrestricted favored-nation clause. The inevitable conclusion is that the Prussian as well as the American negotiators had the conditional rather than the unconditional practice in mind.

Such being the case, articles V and IX should be interpreted together, just as Mr. Livingston's note to Austria in 1832 indicated that they must be for the Austrian treaty. The treaty of 1828, then, calls for *conditional,* not unconditional, most-favored-nation treatment. Dr. Glier reasons to this conclusion regarding this treaty, and he holds the same view for the treaty of Sept. 19, 1857, between Argentina and Prussia. In this latter treaty the compensation clause precedes the general article which promises that "no higher or other duties will be levied * * * than on products of any third country" (articles III and IV, respectively). Here, likewise, the two clauses must be read together.[9] He goes even further, and from a careful comparison of the wording and circumstances of several treaties of the United States, Prussia and Argentina[10] he reaches the conclusion that their most-favored-nation clauses are not unconditional even *pro praeterito.*[11] He points out that article V of the United States-Prussia treaty of 1828 in reality states merely the negative side of most-favored-nation treatment; it prevents discriminations and assures each state that it will not be put at a disadvantage with others as regards the general tariff; while article IX states the positive side and guarantees the extension of favors

[9] Glier, *op. cit.,* 277-299.

[10] U. S.-Prussia, 1828; U. S.-Argentina, 1853; Prussia-Argentina, 1857; U. S.-Nicaragua, 1867.

[11] Glier, 44-49.

(in return for compensation) which may be subsequently granted to third states.[12]

Although the inference might be drawn from this summary of Dr. Glier's elaborate presentation that the meaning of the treaty of 1828 could have been arrived at by a comparatively simple study, as a matter of fact from the time when the clause first began to have an importance through the changes which the last two decades have wrought in European tariff policies, these two clauses in that old treaty have been the source of endless disagreement. The Germans have agitated themselves over the denial by the United States of their claim for unconditional treatment. Our department of state, while it has been consistent in maintaining that the Germans have, under the treaty, no unconditional most-favored-nation rights, has, at the same time, been somewhat inclined to take advantage of the circumstances in which Germany has placed herself through her treaties with neighboring European states by demanding "freely" for United States commerce concessions which it is not surprising that the Germans should resist most strenuously. The Germans, on the other hand, have not been unanimous in their conception of the content and obligations of the clause, and have exhibited some inconsistency and lack of co-ordination in the arguments by which they have supported certain contentions.

We have already spoken of the claims presented by Germany after the making of the United States-Hawaiian treaty of 1875, and of how the Germans in making their treaty with Hawaii, in 1879, recognized the peculiar relations of Hawaii and the United States as a sufficient ground for making "exceptions" to the rule which they considered laid down in the treaty of 1828. In 1883 the Bundesrat failed to include the United States in a list of eighteen states which were entitled by treaty to tariff reductions. But in 1885, in a list of twenty-four most-favored-nation states which were entitled to the reductions made to Spain, the name of the United States was included. No change had occurred in the treaty relations of the two governments in the interval.

The action of Germany in concluding the Saratoga convention

[12] Glier, *op. cit.*, 255–262.

in 1891, clearly indicates that either the German government did not consider itself bound to accord to the United States unconditional most-favored-nation treatment, or it knowingly overlooked what rights the acceptance of that interpretation implied in favor of both parties. According to that interpretation each country should have given the other all the concessions which it made to any third. But by the exchange of notes of August 22, 1891, Germany expressly promised to remove certain restrictions upon the importation of American meats, and to give American agricultural products the same treatment accorded to agricultural products of Austria and other countries, while in return, and as a compensation, the United States removed the duty on sugar from Germany. Neither gave the other *freely*, and neither gave the other *all*, the favors given to third parties. Neither was enjoying from the other unconditional most-favored-nation treatment.[13] Staats-Sekretär v. Marschall said in 1897:[14]

> The Confederated Governments, when they had negotiated the commercial treaty with Austria-Hungary in 1891, did not doubt for a moment that they had the obligation to concede to the United States the same reduction of tariff which they had granted to Austria-Hungary.

The Wilson Tariff act, in 1894, not only made sugar dutiable, but provided that all sugar from bounty-paying countries pay an additional duty of one-tenth of a cent per pound. The Germans protested against this, as a violation of the most-favored-nation clause, especially since Germany was paying a bounty "by no means as high as those of Austria or France."[15] In 1897 the new tariff contained a provision which remedied this latter difficulty by making the countervailing duty equal the net amount of the bounty. The German government still protested on the ground that the duty as applied on German sugar violated the treaty of 1828 and "destroyed the premises on which the Saratoga Notes were effected."[16] But the Saratoga Convention had fallen when the tariff of 1894 went into effect.

[13] For an interesting point as to the ideas which the respective governments entertained at that time of their obligations see Fisk: German-American Most-Favored-Nation-Relations, Jour. Pol. Econ., 1903, 11:226.

[14] In the Reichstag, May 7.

[15] U. S. For. Rel., 1894, 234–9.

[16] U. S. For. Rel., 1897, 175–7.

In 1894 there came up the contention over our salt duties.[17] Mr. Olney, as attorney-general, said, " * * * The United States concedes 'free salt' to any nation which concedes 'free salt' to the United States. Germany, of course, is entitled to that concession upon returning an equivalent.[18]

By the act of 1894 salt had been put on the free list, but salt coming from any country which imposed a duty on salt from the United States was subject to a duty. Two years later, in 1896, Mr. Olney, then secretary of state, referring back to his opinion in 1894, raised the question of the applicability of the treaty, suggesting that he would be greatly assisted by being "informed of the grounds, if any, for regarding the treaty stipulation [of the treaty of 1828] as now operative with respect to the whole German Empire.[19] No response to this request appears to have been given.

This raises a general question of interpretation which becomes practically applicable at this point: What becomes of the treaty rights and obligations of a state which merges its identity in that of another or others? Did the treaty of 1828 continue in force? If so, did it apply to the whole German Empire, or to Prussia alone? Without going into the abstract question—there is sufficient ground for supposing that the treaty would continue in force so far as Prussia was concerned, though even that, may, with good precedent, be denied.[20] The position of Prussia

[17] Mentioned *supra*, Chapter IV.

[18] Moore, *op. cit.*, V, 273-4.

[19] Note to Baron v. Thielmann, Feb. 25, 1896, U. S. For. Rel., 1896, 208-209. Moore, *op. cit.*, V, 353.

[20] Cessation of independent existence (when Hanover and Nassau were incorporated by conquest into the Kingdom of Prussia) rendered the execution of treaties impossible.

Terlinden v. Ames (1902), 184 U. S. 270, 283. Moore, *op. cit.*, V, 320.

"Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into." Hall: International Law, 5th Ed., 351-2.

That treaties of a state cease upon its incorporation into another state is laid down by Halleck: "But the obligations of treaties even where some of their stipulations are in terms perpetual, expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things," Halleck: International Law, Ch. 18, Sec. 35. See Wheaton, Elements of International Law, Sec. 275.

Vattel held that even a partial loss of sovereignty, as in the case of an

in the German Confederation is unique. Also, Prussia was in no sense "absorbed" in the forming of the German Empire. Furthermore its predominance in the empire may readily be used as an argument for the extension of the application of its treaties to the whole empire. But there is no substantial ground, other than this, for urging that the application extended thus.

Supposing that we admit that the treaties of Prussia remained in force. This does not at all imply the admission of their extension to the empire. What evidence have we for deciding this point? It appears that the treaty was at first regarded by both the American and the German government as applicable not only to Prussia but to the entire German Empire.[21] When German-American relations assumed a larger importance the German government continued to emphasize this claim while the United States emphatically denied it. Many of the agreements and obligations of Prussia were extended first to the North German Bund and later, with those of the Bund, were passed on to the empire. On the other hand there are many cases in which the treaty obligations of the separate German states continued in force but only as obligations of the original contracting state.[22] Although the

alliance, causes ancient treaties to fall, if incompatible with such alliance. Moore, V, 349.

"The forcible incorporation of Hanover into the Prussian kingdom instantly destroyed previous Hanoverian treaties. The admission of Texas into our Union * * * extinguished the treaties of the Independent Republic of Texas. The recent French law declaring Madagascar to be a colony of France ended the former treaties of that kingdom. It is the fact, not the manner of absorption that determines treaties. It does not even follow that existing treaties of the absorbing state extend to the acquired territory. The treaties of the German Empire are held not to apply to the ceded French provinces of Alsace and Lorraine. * * * the fact of Hawaii's ceasing to exist as an independent contractant extinguishes" [its treaties]. (Mr. Sherman to Mr. Toru Hoshi, June 25, 1897. Moore, V, 349-50).

"Die Konstitution Preussens ist aber doch durch die deutsche Reichsverfassung derart eingeschränkt, dass Preussen keine eigene Handelspolitik, die für die Erfüllung des Vertrages vom Jahre 1828 Voraussetzung ist, mehr machen kann." (Glier, 305 foot-note.)

[21] Fisk: Jour. Pol. Econ., 1903, 11: 221.

[22] By the formation of the North German Union the entire navy of the union was placed under the command of Prussia. It was advised that the provision of the treaty between the United States and Prussia, May 1, 1828, for the arrest of deserters from the public ships of the respective countries applied to public vessels sailing under the flag of the North German Union. Evarts, At. Gl., (1868), 12 Op. 463; Moore, *op. cit.*, V, 353.

The continuance of the extradition treaty between the United States and

treaty of 1828 was not formally recognized as extending to the empire, it was declared in the Reichstag Feb. 10, 1885, that the United States was entitled to most-favored-nation treatment in Germany. This was repeated in the Bundesrat, Jan. 30, 1892, and again in the Reichstag, May 31, 1897. Count Posadowsky called attention on Jan. 14, 1903, to the position of the government in 1885, quoting this as a recognition of the application of the treaty. These were unilateral declarations as to the force of the treaty. Neither government could of itself declare such extension of treaty obligations.

On the side of the United States, Secretary Gresham said, in 1894, "the stipulations [of the treaty of 1828] placed the commercial intercourse of the United States and Prussia, not the entire German Empire, on the most-favored-nation basis." Secretary Olney expressed similar views, and Secretary Sherman the same in January, 1898.

Herr Calwer, a member of the Reichstag, writing in 1902, took the position that Prussia could not carry on an independent tariff policy, and that this treaty had applied only to Prussia, wherefore it lapsed of its own accord, making the immediate question whether Germany wished to renew the Prussian treaty and whether the United States would agree to its extension to the empire.[23] Dr. Glier is of the opinion that the treaty never applied to the empire and that the new relation which Prussia assumed and the alteration which was made in the Prussian constitution at the time of the making of the treaty abrogated the treaty altogether.[24] Although it has been repeatedly discussed within the last ten years no official decision of this question has been arrived at.

In 1896, Staats-Sekretär v. Marschall declared that the treaty of 1828 called for *unconditional* most-favored-nation treatment.

Bavaria was recognized by the United States District Court, but not as extending to the Empire. In re Thomas, 12 Blatch, 370 (1874).

In 1889 the German foreign office issued a memorandum on the subject of extradition saying that as this subject had not been regulated yet by the whole Union, the several states were free independently to regulate extradition by agreements with foreign states, and that "with the United States also extradition is regulated by various treaties." Moore, *op. cit.*, V, 355.

[23] Calwer: Meistbegünstigung der Vereinigten-Staaten, 28. See Fisk: Jour. Pol. Econ. 1903, 11: 235-6.

[24] See Glier, 303-307.

In 1898, the United States made an arrangement with France by which it granted the French the concessions allowed under Sec. 3 of the Dingley Act. Germany claimed the concessions granted to France. In the Reichstag, on Feb. 11, 1899, Staats-Secretär v. Bülow declared that the treaty guaranteed *unconditional* most-favored-nation treatment; that article V was not limited by article IX; that as article IX mentioned only commerce and shipping ("Handel und Schifffahrt"), customs duties were not included in it, but in article V alone; and that, therefore, the requirement for compensation did not apply to tariff concessions. This was clearly a forced distinction. Article V applies to the general tariff and asserts only the negative side of most-favored-nation treatment. The two clauses must be read together. Count Kanitz, referring to our denial of the advantages given France, proposed in the debate [25] that instead of giving notice of an intention to terminate the treaty of 1828, the Germans give it the American interpretation in applying it to the United States.[26] On the same day Count Posadowsky asserted that Germany was entitled to unconditional most-favored-nation treatment and that the practical question was whether Germany should continue in her understanding of the obligations of the clause or should adopt the interpretation of the United States and decline in future to give the United States the advantages of the Caprivi treaties. Upon being apprised of this, Secretary Hay wrote to our ambassador to Germany, Mr. White: "While we do not deny the right of Germany to adopt the same construction which controls the action of this government, it should be remembered that whatever construction may be adopted it must be applied uniformly to all governments that are protected by the like treaty clauses. * * * It is evident that Germany cannot apply one construction in her relations with this government and another in her relations with an European government.[27] Our government regretted that the Germans "should refuse to consider article IX * * * as having any force or effect in connection with article V." The concessions to France had been dependent upon compensation.

[25] In the Reichstag, Feb. 11, 1899.
[26] U. S. For. Rel., 1899, 297. Moore, *op. cit.*, V, 285.
[27] Hay to White, April 8, 1899. U. S. For. Rel., 1899, 301. Moore, *op. cit.*, V, 387-8.

"The American government is ready to make the same concessions to Germany for equivalent concessions." If the concessions should be "freely" granted to Germany, the United States would have to grant the same gratuituously to all other nations.[28]

The matter was temporarily settled by the German-American reciprocity agreement, of July 10, 1900. By this the American government obtained all the tariff advantages which European countries were enjoying under the Caprivi treaties. The United States did not accord Germany absolute most-favored-nation treatment but made certain concessions authorized in the Dingley Tariff Act. Certainly in this transaction neither government was negotiating upon the basis of an unconditional most-favored-nation obligation. This agreement was to regulate German-American commercial relations until 1903, after which Count Posadowsky claimed they would rest again on the treaty of 1828.

In the interval the Germans were making a scientific study of various tariff questions, and the government began to revise its views on the subject of its most-favored-nation obligations. Herr Calwer pointed out that the treaty of 1828 was inoperative. Dr. Paasche said, Dec. 13, 1902, in the Reichstag, "We expect that the government will undertake a thoroughgoing revision of all treaties giving the most-favored-nation advantages. * * * We have absolutely no occasion to concede anything to such nations as are glad to take what we give other countries without making us any concessions in return. The United States has introduced the limitation of the most-favored-nation clause; we have every reason to act in precisely the same manner." [29] On the 15th of January, 1903, Count Posadowsky declared "the United States no longer enjoys most-favored-nation treatment in Germany." [30] By this he meant that the United States was no longer recognized as having a right to demand unconditional most-favored-nation treatment. This amounted to a recognition of the reciprocal nature of the treaty of 1828. Count Posadowsky said that he him-

[28] The notes of the U. S. Department of State make certain errors in this correspondence, *e. g.*, in speaking of "Article XXVI" of the treaty of 1828. U. S. For. Rel., 1899, 301. That treaty had but twenty-four articles. The reference is evidently to Art. IX.

[29] Quoted by Prof. Fisk: Jour. Pol. Econ., 1903, 11: 236.

[30] Die Vereinigten-Staaten sind nicht mehr meistbegünstigt in Deutschland."

self had previously been mistaken in believing that concessions made to other countries in new European treaties would have to be given to the United States ("ohne weiteres").[31] He also stated the necessity for revising our treaty relations and for arriving at a common basis for dealings and interpretations. In February, 1905, appeared Dr. Glier's book. In his effort to discover the real meaning of the German treaties, and to formulate a policy for German most- favored-nation practice in future, he arrived, after having studied more than 500 treaties, at such conclusions as the following: That the interpretation given the treaty of 1828 by the German government was entirely wrong;[32] that Germany had no right to demand unconditional most-favored-nation treatment of the United States;[33] and that the Americans have loyally fulfilled their treaty obligations.[34] He concludes also that Germany had likewise only a *conditional* most-favored-nation treaty with Argentina and had therefore neither the right to demand, nor the obligation to give, concessions from and to Argentina except on a basis of reciprocity.[35]

Among modern treaties which contain the clause, none is more striking in character than the Frankfort treaty which was made at the close of the Franco-Prussian war, between France and Germany, May 10, 1871. In this we find the pledge, in article XI, that the French and German governments will base their commercial relations upon the system of reciprocal treatment on the footing of the most-favored-nation. * * * This rule shall not apply * * * to favors which either has granted or

[31] Das würde der Fall sein, wenn wir mit den Vereinigten-Staaten ein allgemeines Meistbegünstigungsverhältnis hätten. Das ist aber nicht der Fall. * * * Davon kann also gar keine Rede sein, dass den Vereinigten-Staaten von Amerika ipso facto eines Vertragsabschlusses mit anderen Staaten neue Konzessionen zufallen könnten." Quoted in Glier, 267. See also Glier, 310.

[32] " * * * die Ueberraschung der Reichsregierungs völlig unbegründet war." Glier, *op. cit.*, 81.

[33] Wir hatten keinen glatten Meistbegünstigungsanspruch gegen sie," 273.

[34] " * * * die Amerikaner ihren Vertragspflichten loyal und gewissenhaft nach zu kommen bestrebt sind," 274-5.

[35] Passim—but especially pp. 6, 8, 9, 61-2, 277. The Argentinian-Prussian treaty of 1857 has never been abrogated, and the same arguments apply as to its being or not being in force which have been cited for the United States-Prussian treaty.

shall grant to states other than England, Belgium, Holland, Switzerland, Austria and Russia.[36]

At a meeting of the German Landwirtschaftsrat on the 9th of February, 1904, Count Hans Schwerin said that the Frankfort treaty made it necessary that Germany give the United States all the concessions which Germany made to France gratuitously. The Frankfort treaty had placed German-French commerce upon a basis of permanent unconditional most-favored-nation treatment. Herr Calwer had written in 1902, "we must grant to France gratuitously every concession made to England, Belgium, Holland, Switzerland, Austria, and Russia. * * * There follows indirectly from this affirmation of the principle of reciprocity [on the basis of article IX of the Prussian-American treaty] the legal claim of the United States to unrestricted most-favored-nation rights. Since all advantages accrue to France without reciprocal compensation, such compensation can no longer be demanded of the United States." In other words, says Professor Fisk, Germany had placed herself in the position of being morally obligated to give United States *unrestricted* most-favored-nation privileges while she can only claim *restricted* privileges in return.[37] Dr. Glier strenuously objects to this view of the obligations of Germany under article IX in the treaty of 1828, in connection with her obligations to France under the treaty of 1871. His contention is that the favors granted by Germany to France are not gratuitous, but in return for compensation. This, because France treats most German imports on a better footing

[36] Sont compris dans cette règle les droits d'entrée et de sortie, le transit, les formalités douanières, l'admission et le traitement des sujets des deux nations ainsi que de leurs agents.

Toutefois, seront exceptées de la règle susdite les faveurs qu'une des parties contractantes. par des Traités de Commerçe a accordées ou accordera à des états autres que ceux qui suivent; L'Angleterre, la Belgique, les Pays-Bas, la Suisse, l'Autriche, la Russie.

The appearance of the clause in this sort of a treaty and in this form is unique. This was not a commercial treaty, with a limited duration, but a political treaty which cannot be denounced at the will of either party, and which is in theory, perpetual. It is claimed that in operation each party has been given the benefit of every favor which the other has granted to the nations specified. This worked at first somewhat unfavorably to France, as Germany assumed a passive attitude and allowed the French to make treaties from which Germany reaped the benefits. With time the conditions have been substantially reversed.

[37] Fisk, Jour. Pol. Econ., 1903, 11:222.

than the same goods imported from the United States. If it can be shown that France makes Germany concession for concession, the soundness of Dr. Glier's position cannot be questioned. But the evidence presented is not conclusive. The all-comprehensive form of article XI of the Frankfort treaty, implying that the advantages now extended and to be extended by each of the contracting parties shall be considered as equivalents for all advantages extended and to be extended to it by the other, is the most explicit provision for the "free" granting of future favors which can be imagined, and this "blanket" compensation scarcely meets the principle of special compensation. But even were Dr. Glier's point established as regards Franco-German relations, so long as Germany "freely," grants to other nations having most-favored-nation rights, the concessions which she grants France, there can be no question of denying the same advantages without compensation to the United States. The only real escape from that obligation—and the sound one—is to assert that the treaty of 1828 is no longer applicable.

On December 17, 1903, the United States-Cuban reciprocity treaty was proclaimed. By this treaty all Cuban articles which are not admitted free into the United States are given 20% reduction on the general duty, and articles of the United States enjoy from 20% to 40% reduction from the general tariff on entering Cuba. Article VII lays down that neither country will grant to a third the advantages granted to the other. The rates granted by each to the other shall continue during the term of the treaty "preferential in respect to all like imports from other countries." The United States will admit "no sugar the product of any foreign country, * * * at a lower rate than that provided by the tariff act [of 1897]." This establishes a very real differential, and would at first seem directly contrary to the practice of the United States which is that every country shall be given the opportunity to obtain advantages conceded to a third by offering compensation. This provision discriminates especially against German sugar. The Germans have pointed out that even though the relations of Cuba and the United States are unusually close, yet Cuba is a sovereign state and the United States bargains with her as such. According to the German view, so long as Germany and the

United States have most-favored-nation relations, the United States must give Germany the opportunity to offer a concession for which she may secure the advantage granted to Cuba. Whether or not one will grant this depends on the view taken of the relations between Cuba and the United States. There is much similarity between this case and the Hawaiian case wherein in 1878 Germany admitted that "extraordinary circumstances" made the preferential between Hawaii and the United States warrantable. South American treaties now expressly exclude favors granted South and Central American states from the operation of the most-favored-nation clause. Portuguese treaties expressly exclude favors granted Spain and Brazil. Sweden, Norway, and Denmark exclude favors granted each other. Colony holding countries expressly or impliedly exclude the reciprocal relations of the mother country and the colonies. Japan excludes favors granted to Korea and lands east of the Straits of Malacca. Why should not the relations of the United States and Cuba be excepted from the operation of the most-favored-nation clause? The denial of this right can be made only by placing emphasis upon the necessity for *express* exception.

In the new series of German tariff-treaties, whenever rates differing from those already in effect were established with a given country, those rates were extended automatically to all other countries with which Germany had most-favored-nation relations. The German Embassy notified the United States government that the arrangement of 1900 would be terminated in time to apply to the United States the new general rates which were to go into effect March 1, 1906. Toward the end of 1905 they presented certain demands by meeting which the United States could secure the transitory extension to our commerce of the lower rates. These demands included especially a number of changes in our methods of customs administration. This was met by the issuing of a series of orders to our consular agents and customs officers and a proclamation by the president renewing reductions of duties, specified in the Dingley Act. The German government considered these concessions sufficient to warrant the extension to the United States of the rates established in the seven new treaties. This arrangment was to continue in force

until June 30, 1907. In the summer of 1906, Germany made further treaties with Sweden and Bulgaria, and refused to extend the additional conventional rates to United States, although they extended automatically to the parties to the seven treaties. Plainly, Germany did not consider that any unconditional most-favored-nation obligation existed between herself and the United States, and plainly the United States are liable to be discriminated against at any time.

At this point the United States Tariff Commission of 1906 was appointed.[38] After several months' work in Germany with the experts whom the German government had appointed the commission made a partial report, February, 1907, proposing: (1) the continuance of the *modus vivendi* for one year; (2) the adoption of a reciprocity treaty with Germany, including the concession of certain rates of duty on each side. A commercial agreement was signed May 2, 1907, which went into effect July 1, 1907. Under this agreement about 97% of the imports of the United States are subjected in Germany to the conventional tariff, that is, receive the reduced rates made to countries having most-favored-nation relations with Germany. In return the United States government made changes in the customs and consular regulations along the lines requested by Germany. This convention was to continue in force until July 30, 1908, and afterwards, subject to six months' notice for termination. This agreement then is the basis upon which commerce of the United States with Germany is now regulated.[39]

The treaty of 1828 has not been formally abrogated by either government, nor have the questions whether it extends to the whole empire or only to Prussia, or whether it calls for unconditional or conditional most-favored-nation treatment, been decided. But so far as its most-favored-nation clauses are concerned, it is absolutely a dead letter. Neither in theory nor in practice have its terms applied to German-American relations in

[38] N. I. Stone, of the Bureau of Manufactures; S. N. D. North, of the Census Bureau, and E. P. Garry, of the Treasury Department.

[39] On the subject of our recent commercial relations with Germany see, 60th Cong. 1st Sess., Sen. Doc., 185; Weltwirtschaft, 1907, I, p. 16, and 1908, I, p. 8; U. S. Tar. Series, No. 7, 1908; Willis, H. P.: Reciprocity with Germany, Jour. Pol. Econ., 1907, 15:321-344, 385-398.

recent years—we may almost say, since 1891. As a matter of fact this treaty has been omitted from the list published by the British government in 1908 of "Commercial Treaties in Force." The present arrangement is satisfactory neither to Germany nor to the United States. It is imperative that we come to an agreement concerning a new and sound commercial policy, and one of the first problems to be solved in the effort to reach an agreement is a common basis for most-favored-nation treatment.[40]

[40] See Willis: Jour. Pol. Econ., 1907, 15: 388 ff.

CHAPTER IX

ADVANTAGES AND DISADVANTAGES. SUGGESTIONS

The objections to the most-favored-nation clause fall into three classes: (1) those which find fault with its operation in general; (2) those which condemn the strict interpretation; and (3) those which are urged against the limited interpretation.

Among the general objections, the most prevalent is that the clause becomes a hindrance to the freedom of action of a nation. This is the sentiment which has led some nations to attempt to abolish their most-favored-nation treaties — and it is readily seen that this idea is entertained in conjunction with a policy of strict interpretation. At the same time the *uncertainty* and *vagueness* which attach to the clause have given rise to widely divergent views as to its value and no little misapprehension of its advantages and disadvantages. The fact that the third nation sometimes gets at almost no cost a greater privilege than a second has purchased at what to it is a great price, and that a nation can not be sure when it makes such a treaty how future circumstances may affect its value or how a co-contractant may eventually interpret it, suggests an insecurity which results in some cases in a decided aversion to the use of the clause.[1]

[1] The circumstances that every later favor will also have to be extended to all the earlier parties to treaties "raubt im übrigen dem Zugeständnisse einen Teil seines Wertes als Austauschobject; und so ist es gekommen, dass die Meistbegünstigungsklausel sich oft mehr als ein Beförderungsmittel der Zollermässigung gezeigt hat. Dadurch ist sie vielerorts in Miskredit geraten." Oncken, in Handwörterbuch, IV, 1079.

Si le traité de commerce permet de tenir compte dans les relations internationales, des intérêts spéciaux que l'on peut avoir vis-à-vis de chaque pays en particulier, la clause de la nation la plus favorisée a pour effet d'annuler cet avantage." Poinsard: Droit International, 374.

Dr. Manuel Herrero Espinosa, ex-Minister of Foreign Relations in Uruguay says that the absolute most-favored-nation clause is completely inadmissible —because it is very difficult, if not impossible, for two countries to make

M. de Martens considers it wrong to expect the strict interpretation of the clause to apply at all times. We should distinguish between a commercial advantage pure and simple, and an exchange of advantages. In the latter case, for the second nation to demand the favor granted the third nation, would work a hardship to the first, and this would be contrary to the principle of reciprocity contained in the treaty.[2] Lehr, however, doubts whether this distinction will be recognized by a nation which has made an unqualified most-favored-nation treaty.[3] Von Melle, while he seems to insist upon the principle of strict interpretation, recognizes that even under the best conditions, its general application may result in injustice.[4] He gives the example suggested by Schraut,[5] and since quoted by almost every writer on the subject: A certain state may have concluded a treaty with another not to levy a duty upon the wines of the latter according to the percentage of alcohol, so long as that state does not levy similar duties upon the wines of the former. Yet a third state, though charging duties on wines according to the percentage of alcohol, might demand in virtue of the most-favored-nation clause this more advantageous treatment for its wines. This would evidently be unjust to the first nation. It does not, however, he adds, imply the falsity of the general principle,[6] and he would apparently put nations on their honor not to take advantage of one another.[7]

A strong objection to the clause is based upon the fact that in

engagements on a basis of absolute equality with a third. He says, further, "Me pronuncio, pro tanto, decididamente en contra de los tratados que se concretan á la enunciación de la cláusola de la nación más favorecida sin excepciones, pues es dar por nuestra parte—hablo de América—una enormidad sin recibir nada en beneficio." Quoted in Argentina: Doc. Dip. y Consulares, Bol. No. 17, 1903, p. 17.

Cf. Cavaretta, *op. cit.*, 159.

[2] De Martens, Droit International, II, 322; also, Calvo, Droit International, VI, 287.

[3] Lehr, *op. cit.*, 315.

[4] "Andrerseits lässt sich freilich nicht verkennen, dass durch die stricte Interpretation der unbeschränkten Meistbegünstigungsklausel in einzelnen Fällen sehr harte Consequenzen für den Verpflichteten entstehen können." (Von Melle, *op. cit.*, 206.)

[5] Schraut, *op. cit.*, 43.

[6] Von Melle, *op. cit.*, 206.

[7] "Uebrigens dürfte von der Loyalität der contrahirenden Staaten die Abstandnahme von einer derartigen unbilligen Ausnutzung der Meistbegünstigungsklausel zu erhoffen sein." (Von Melle *op. cit.*, 206.)

general the obtaining of any favor — this is the view of those who look to the clause for positive advantages — depends upon a treaty subsequently made by the co-contractant with a third state, which leaves the treaty in this respect incomplete and the advantages to be derived from it a very uncertain quantity. For instance, Staats-Sekretär v. Marschall suggested that the clause acquires no value in any given treaty until further treaties are made with other states. It thus acquires its real import not from the will of the parties to the original treaty but through the "treaty-will" of other states.[8] This, Dr. Glier regards as strongest among the arguments against unconditional favored-nation practice.[9] A further complaint made against the operation of the clause in some cases is, that it occasions a loss of revenue.

These objections have furnished the field for much argumentative attack and the starting point for several not very effective crusades against most-favored-nation treaties. We have already mentioned certain opposition to the clause on the part of Spain, Portugal, France, and South American countries. Dr. Costa, of Argentina, has argued that the Argentinians cannot gain sufficient from such treaties to compensate them for what they concede, because so few Argentinians reside in Europe while Argentina has a relatively immense foreign population. Sr. Gueselaga, in his "Estudio de los tratados de comercio de la Republica Argentina", urged the denunciation of all the Argentinian treaties in order to eliminate the most-favored-nation clause entirely.[10] Dr. Costa's argument applies to the incidental advantages such as treatment of subjects, rather than to those extended to commerce and navigation directly.

In France, in 1889, the extreme protectionists desired to exclude the clause from all future treaties, on the ground that, although France had less to fear in given lines of production from one country than from another, yet the advantages given

[8] Der Inhalt der Meistbegünstigungsverträge bestimmt sich nicht durch meinen Vertragswillen, sondern durch den Vertragswillen anderer Staaten. In the Reichstag, Jan. 22, 1892. Glier, 354.

[9] Diese Erklärungen bilden u. E. das stärkste Argument gegen die unbedingte Meistbegünstigung. Glier, 353.

[10] Quoted in Argentina: Doc. Dip. y Consulares., Bol. No. 17, 1903, p. 9.

one had to be given to the other.[11] Still another argument for doing away with the clause is that its use makes a concession offered in negotiation with a third party less valuable to that party because it is known that the concession must be or may be given to another or other nations.

On the other hand, the majority opinion champions, and the general practice favors, the retention of the clause. Commercial treaties, suggests Von Melle,[12] may be divided, as regards their tariff provisions, into three classes: first, those containing only *special tariff agreements;* second, those which in addition, have the *most-favored-nation clause;* third, those which have *no special tariff agreements,* but *only the most-favored-nation clause.* In the first, the parties agree to charge no higher tariff than that specified in the schedule. This restricts each in its freedom of action, but only as against the co-contractant and not as against a third nation. If, now, a most-favored-nation clause be used without the tariff provision, an increase in the tariff is allowed, but the treatment of the co-contractant must not be less favored than that of any other nation. A state bound by such a treaty can neither raise its tariff nor lower it for the benefit of a second state. This constitutes a limitation, and may be inconvenient, but, as the reciprocal principle holds, the advantages in general may outweigh the inconvenience.[13] A state gains, as compensation, a firm tariff basis, an assurance that alterations will take place only in the direction of lowering, and that the competition of any other state, through special advantages which might be given it by a higher tariff, is not to be feared.[14]

This security which can best be obtained through the most-favored-nation clause, constitutes a very great advantage in international trade, and is so important that the limitation of freedom and loss of customs duties must be made a minor consideration.[15] At once rigid and elastic, by its rigidity insuring against surprises and by its elasticity easing the shock of sudden changes in commercial policy, the clause performs an invaluable

[11] See Meredith: Protection in France, 20-22.
[12] *Op. cit.,* 210.
[13] *Cf.* Fontana-Russo: Trattato di Politica-Commerciale, 606.
[14] *Cf.* Yves Guyot: La Comédie Protectioniste, 32.
[15] Von Melle, *op. cit.,* 210.

function in international trade. Its important influence in the overthrow of the individualistic and dualistic commercial policies which formerly hindered world commerce has already been emphasized. Its all important function in automatically establishing the conventional schedule in the "general and conventional" tariff system, and in preventing the inevitable confusion which would arise from the extensive use of tariff-treaties in its absence is too well recognized to need emphasis.

Logically, the universal acceptance of that form and interpretation of the clause which would satisfy the "unconditional" school would eventually lead, whether that be its object or not, to absolute free trade. To the defenders of the limited interpretation, who argue that to extend gratuitously to one nation that which has been purchased by a third is unfair to the latter, the adherents of the opposite interpretation answer that this would be true if the discrimination were against one nation only, but that if the rule be applied to all, all will be equally benefited, and there will therefore be no discrimination, and, further, that the benefits of such an application work both ways. This is simply another way of saying—all unconsciously, perhaps—that the universal use of the clause, in its unqualified form, with strict interpretation, would abolish all protective systems, and, as we have remarked, result in free trade.[16] Some even go so far as to argue that under the other interpretation the clause has no value since it offers no constant or certain guarantee. This argument—all else aside—overlooks entirely the chief function of the clause, which is—to prevent discrimination. On the other hand, under the Utopian system to which universal unconditional usage would lead, that of free trade, the clause would have no value as it would be absolutely redundant.

The explanation of the disagreement is to be found in the conflict of commercial policies. In viewing the politics of modern commerce we have to take into consideration that there are

[16] "'By the self-registering action of the most-favored-nation clause, common to this network of treaties, the tariff level of the whole body is continually lowered, and the road being paved towards the final embodiment of the Free Trade principle in the international engagement to abolish all duties other than those levied for revenue purposes.'" (Morley, Life of Cobden, II, 342.)

no less than five tariff systems in operation. First comes the English system of approximate, though not absolute, free-trade.[17] A country following such a system can make unqualified most-favored-nation treaties with a consciousness that it has everything to gain and practically nothing to lose. At the opposite extreme come countries such as the United States, with a general tariff at the same time highly protective and comprised in a single schedule of duties. A general acceptance of the unconditional usage would make it necessary for countries which have and wish to retain this system either to omit the clause entirely from their treaties, or to limit the number of treaties containing it to a small circle of nations and refrain absolutely from granting concessions to other nations. No nation in the position of the United States, and with a highly-protective, single-schedule tariff, could, with due regard to economic circumstances, give most-favored-nation concessions under other than the United States interpretation, nor has the United States ever meant to do so.[18]

Between the two extremes come the three systems which have developed practically within the past twenty-five years, the "maximum-and-minimum," the "preferential" and the "general-and-conventional" tariffs. In the operation of the maximum-and-minimum system, as exemplified in France, commerce with any given country is less dependent upon treaties than under systems where legislative control is more indirect. It is true that even here, unconditional most-favored-nation treatment means the admission of all who enjoy the right, to participation in privileges extended to *whatsoever* nation, but there is a common stopping point, the minimum rate, for concessions. Since, however, as has happened in their dealings with Switzerland, Italy, and Russia, the French may be forced to grant concessions below the minimum, the operation of this system is not

[17] Great Britain has a list of twenty dutiable articles, the duties being levied for revenue or sumptuary purposes only.

[18] "It would require the clearest language to justify the conclusion that the United States government intended to preclude itself from * * * engagements with other countries which might in future be of the highest importance to its interests." (Whitney v. Robertson, 124 U. S. 190.) *Cf.* Barclay, Problems of International Diplomacy, 140. *Cf. Supra.*

unqualifiedly successful and most-favored-nation treatment under it is not without embarrassment.[19]

The new systems of preferential tariffs which are being developed by the British Colonies in South Africa, Australia and Canada violate the strict principle of unconditional most-favored-nation treatment. The South African Colonies and Australia have two-column tariffs, giving a preferential to the Mother Country and reciprocating British Colonies by means of a surtax on the products of other countries. Canada has adopted a three-column tariff, with a general rate, a preferential rate for England and the Colonies, and an intermediate rate to be extended to countries which make satisfactory concessions in return. Although in theory the inter-relations of Mother-Countries and their colonies are to be excepted from the operation of the clause, yet that theory contemplates *dependent* colonies. The autonomous position of these larger British colonies is such that their commercial dealings and the establishment of their tariff policies approximate those of sovereign and independent countries. Logically, and in practice, their preferential is inconsistent with the idea of unconditional favored nation treatment.

The general and conventional tariff system, of which Germany is the foremost exponent, really owes its success to the most-favored-nation clause. It is only by the operation of the clause that the conventional rate is established, and it is only because each nation knows that it is guaranteed by the clause against subsequent discrimination that it is possible to negotiate successfully the treaties which are a necessary part of the system.[20] In this system, a protective tariff and unconditional most-favored-nation treatment can be harmonized. Yet, even here, the knowledge that the clause generalizes concessions exercises a de-

[19] See Fisk: International Commercial Policies, 95.

[20] As an excellent example of the imperative and unconditional form used in the new German treaties we may cite the treaty between Germany and Russia, January 29, 1894, July 15, 1904, article VI:

The products of the soil and industry of [each, when imported into the other] destined for consumption, warehouse, re-exporting, or transit, will be treated in the same manner as the products of the most favored nation. In no case, and on no account will they be liable to duties, charges, taxes, or dues higher or other, nor be subjected to surtaxes or to exclusion from im-

cidedly restraining influence in negotiations. The government must, in each case, weigh not alone the advantages to be gained in a contemplated treaty, but the effect which the concessions will have on its commercial intercourse with all the other countries to which it owes most-favored-nation treatment. It can not afford, for instance, to grant a large concession to a country with which it has a comparatively slight volume of trade, even though it gain a very real advantage from the return concession, because its own concession must at once be generalized. Thus it hinders as well as helps even in this system. The striking success of the general and conventional system must, however be recognized. Next to the free trade system, it is best adapted to unconditional most-favored-nation practice.

Apropos of the interpretation made by the United States of the reciprocity treaty with Hawaii, 1875, M. Visser suggests that the "impossibility" for other nations to fulfil the conditions necessary to entitle them to enjoy privileges similar to those enjoyed by the United States was an "impossibility" announced by the United States because of the fact that under any other interpretation the treaty would have no value for the United States. The observation fails to carry its intended argumentative weight against the American contention—as there was a *very real impossibility*, and as the circumstances were unusual[21] —but, in its very directness, it furnishes an excellent justification of the American interpretation. Not that a country should interpret every treaty to its own advantage, and overreachingly, but because every reciprocity treaty is framed with the idea of securing mutual advantages, and commercial policies are dictated by motives of economic and political self-interest. To give

portation by which the similar products of any other country are not affected. *Especially any favor and facility, any immunity, and any reduction of the customs dues contained in the German tariff or in the treaty tariffs which one of the contracting parties may give to a third power permanently or temporarily, gratuitously or for compensation, will immediately and without conditions, reservations, or compensation be extended to the products of the soil and industry of the other.*

[21] *Cf.* Herod, *op. cit.*, 116.

"A stipulation, though inconvenient, must be fulfilled if it be explicit; but, in case of doubt, the inconveniences which would result from a particular construction may be used as an argument to show that that construction can not be conformable to the intent of the parties." Livingston to Lederer, Nov. 5, 1832. Moore, *op. cit.*, V. 251.

to such a treaty an interpretation by which it would have no value for one of the contracting parties would be directly contrary to its character and to the spirit in which it was made. Each nation expects when making, and therefore when interpreting, its treaties, that they shall conform to the general scheme of its commercial policy and operate to its commercial advantage.

To these circumstances we must look for an explanation of the differences in present practice, while to the fact that the historical background has been lost sight of we owe most of the disagreement over the interpretation of old treaties. European countries, having adopted commercial policies and a form of the clause different from those which they used at one time, now wish to make the interpretation of all the treaties, both new and old, conform to their present policy.

When view points differ it is very natural that two parties fail to read the same meaning from the words of a clause, where a slight shifting of emphasis makes a great difference to their commercial interests. The content of such terms as "favor", "protection" and "reciprocity" assume a very different meaning in the mind of a protectionist nation which must weigh concession against concession, from that which they are given in the vocabulary of a free-trade nation.[22]

Can a common ground be reached? Certainly this should be possible as far as regards the interpretation of old treaties. As for treaties made since 1860, it would appear fair that the distinction between those clauses which contain the stipulation for compensation and those which do not be recognized, and that the former be interpreted as conditional and the latter as unconditional. At the same time the acceptance of this rule, aid though it would, would by no means rid us of the confusion which must exist as long as both systems continue in vogue.

[22] "What we [English] forget is, that, in its commercial policy, every other Nation has to think of its tariff relations with the whole world—of which we are not always the largest part. And what we should remember is that it would be a very serious thing for a protected country to give us advantages that it might otherwise be inclined to give us, when, under its Most-Favored-Nation Clause, it would have to give the same advantages to other nations." (Smart: The Return to Protection, 137).

Cf. Poinsard: Droit International, 373-4, and Grunzel: System der Handelspolitik, 464.

One of the first impulses among those European nations which in recent years have felt themselves suffering on account of the interpretation placed upon the clause by the United States, was to accept the American interpretation in their dealings with the United States, while retaining the European usage in their dealings with their nearer neighbors. This, however, was impossible for if they first use the European interpretation in dealing with European states, then follow the American interpretation in dealing with the United States, they have to give the latter all the advantages which they give "freely" to other Europeans, and therefore they neither save themselves, nor do they retaliate on the United States.

To illustrate: the German treaties concluded between 1903 and 1906 with the Central European States were based on reciprocity, with mutual concessions, but later Germany, in fulfilling her favored-nation obligations, extended the conventional rates made up from these concessions, to Great Britain, France, and other States "freely". If, then, the Prussian-United States treaty of 1828 had been considered as having full force, Germany would have had to extend all of the same advantages to the United States (freely).[23]

To arrive at a universal system, either European countries must return to that usage which they once practiced in common with the United States, or the United States must give up the system to which she has uniformly held. Neither change could well be effected without changes in commercial policy. There has been some tendency among European economic writers to favor the American most-favored-nation practice as the more expedient and better fitted in the long run to protect commercial interests. If Great Britain swings strongly toward protection, and if the preferential system develops more extensively, there will be good reason for the English to consider a departure from the use of the unconditional clause. The adoption of the conditional form by the Continental nations would somewhat lessen the facility with which tariff-treaty negotiations may be carried on, but it would at the same time free the

[23] *Cf.* Stone: N. Am. Rev., 1906, 182: 445. *Cf. supra.*

negotiators from a number of cramping restrictions. There is, however, no likelihood of such a change being soon consummated. It would be impossible for a decade, since European tariff-relations are settled for that period by the new treaties, most of which run till 1915 or 1917.

For the United States to change would require a radical departure from present commercial policy. Such a change has been made the subject of much discussion. The necessity for a commission to give our tariff policy a scientific and searching consideration as has been done in Germany and France, and as is being done in England, has been urged—and with reason. The possibilities of the conventional and of the maximum-and-minimum systems have been repeatedly canvassed. It is agreed that the machinery of our government makes the conventional system impracticable, in fact impossible. It has been pointed out by some writers that, under it every reciprocity treaty would have to be approved not only by the Senate but by the House, since each would contain new tariff rates which, under the constitution, only the lower house can initiate. The negotiation of a series of treaties would take a long time, and the making of a conventional tariff at the hands of successive congresses would be very difficult.[24] The alternative would be the maximum-and-minimum system. In this the minimum rate could be made uniform by act of Congress and the department of state would be free to make treaties on a reciprocity basis for rates between the minimum and the maximum. To this, Senator Beveridge argues that we must come. Mr. William R. Corwine urges that we should "join the procession of modern nations which have, one after another, discarded the single tariff and adopted one form or another of the maximum and minimum," but he also advocates the elimination of treaties altogether, and that the President be authorized to make commercial agreements within the limits imposed between the maximum and minimum.[25] Professor Willis suggests that the adoption of the unconditional most-favored-nation usage along with tariff treaties would lead to

[24] See Stone, Ann. Am. Acad., 1908, 32: 379-80. See Sen. Beveridge, ib. 409 ff.

[25] See Ann. Am. Acad., 1908, 32: 312, 313.

progressive tariff reductions, and that it would be difficult indeed to get treaties having such an effect through Congress. The maximum and minimum plan would, in his opinion, be clumsy if the minimum duties represent a horizontal reduction from the maximum. To obviate these difficulties he suggests a modification of the latter system; that Congress expand the list of articles contained in Sec. 3 of the Dingley Act and leave to the President the making of reciprocity bargains. Such a system would, he believes, obviate many difficulties as it would admit of the adoption by the United States of the European favored-nation practice.[26]

Since it is a fact that commercial policies differ, and since it is known to every diplomat that treaties have been made and are being made under different circumstances and with differing wordings, old misunderstandings ought to be cleared up, and mutual recriminations should cease.

The attitudes of the leading representatives of the opposing interpretations have been repeatedly stated and regularly maintained. The tariff policies and the motives of each are well known to the others. The treaty-making authorities of each of the great nations have little excuse for entering into future most-favored-nation treaties with others and subsequently claiming that the interpretation put upon the favoring clause by those others is unfair—as each may see in advance what that interpretation is to be. A general agreement should be reached as to the interpretation of each form of the clause, and, if possible a common form should be devised whose meaning will be unequivocal, which can be accepted or rejected upon an absolute basis of interpretation.

Von Steck and Von Melle recognized long since the necessity

[26] Willis, H. P.: Reciprocity with Germany. Jour. Pol. Econ. 1907, 15: 385-398. "Back of this [the problem of tariff policy] is the question to be determined by the State Department with regard to the future interpretation of the most-favored-nation clause. The adoption of the European interpretation of that clause will bring our commercial diplomacy into line with that of other nations, and will do away with serious danger of friction in the future. Could the adoption of the European interpretation * * * be coupled with such a policy of tariff revision as has been suggested, the commercial difficulties which now threaten, not only from the side of Germany, but in other quarters as well, would be definitely removed." (*Ib.* 394-395.)

for definite and unequivocal stipulations.[27] De Martens and Lehr have advocated a more exact definition, for instance a provision that "the contracting parties shall concede to one another all the advantages relative to commerce and navigation accorded by them *gratuitously* to any other power whatsoever," advantages accorded by exchange or for compensation to be entirely excluded from this class.[28] This suggested form accords almost exactly with the interpretation of the United States. The possible objection to it lies in the comprehensiveness of "any other power whatsoever."

Count Posadowsky has said that in future treaty-making it will be necessary to individualize the question of most-favored-nation treatment more specifically and to examine cases individually.[29] Mr. Chester Lloyd Jones strongly urges the advantages which attach to the American usage.

> As applied both to treaty-making and legislation in general the interpretation of the most-favored-nation clause adopted by the United States has the decided advantages of flexibility and certainty. It allows the adjustment of relations to varying conditions and thus avoids the adoption of uniform rules which in many cases would in fact amount to discrimination. It also avoids the uncertainty on the part of the legislatures and the courts which must of necessity be present when, due to the interlocking of the provisions of various treaties, it is not clear to which body of facts any law or treaty may apply.[30]

Sig. Cavaretta believes that whatever reform is made should be on a basis of reciprocity and that treaties should be concluded for a definite period of time.[31] Reciprocity is certainly,

[27] *Cf.* Von Melle, *op. cit.*, p. 207.

[28] "* * * nous pensons, d'accord avec notre éminent collègue, qu'il est essentiel de remplacer cette clause dans les traités à conclure par une définition plus exacte, par exemple, par une disposition portant que 'les parties contractantes se concèdent mutuellement tous les avantages relatifs au commerce et à la navigation, accordés par elles gratuitement à n'importe quelle autre puissance.' Quant aux avantages accordés moyennant échange ou compensation, il nous paraît qu'ils devraient toujours être exclus de la clause." (Lehr, *op. cit.*, 315-316.)

[29] In the Reichstag, Jan. 15, 1903. Quoted in Glier, p. 323.

[30] C. Lloyd Jones: The American Interpretation of the Most-Favored-Nation Clause. Ann. Am. Acad., 1908, 32: 393.

[31] Cavaretta, *op. cit.*, 167-168, and note 2.

although it may not be admitted in individual instances, the principle aimed at in the commercial policies of modern nations.

Whether accepting, as many do, or rejecting the idea of framing a clause which will embody the principles involved in the "compensation" form, all who discuss the clause agree that care should be taken in making future treaties, and that the interests of commerce and international good-fellowship demand that nations come to an agreement as to means and methods for avoiding misinterpretation. In 1902, the Dairy Congress in Belgium adopted a resolution favoring either the abolition of the clause, or the insertion of a provision restricting it and specifying that its operation should not extend to reductions of duties or the liberty of trade which had been conceded to other nations on a basis of reciprocity.[32] As a result of discussion at the Pan-American Scientific Congress, at Santiago, Chile, December 25, 1908—January 5, 1909, the Congress voted:

> The Pan-American Scientific Congress, in view of the difficulties which have been caused by the interpretation of the most-favored-nation clause, recommends that the bearing of the clause should be defined in each treaty in which it is stipulated. When the most-favored-nation clause is granted, the respective governments should remain free to make special concessions to neighboring countries.[33]

Sir Thomas Barclay suggested in a paper read at the Conference of the International Law Association at Portland, Maine, August 3, 1907, this resolution:

> Whereas any varying interpretation of the most-favored-nation clause gives rise to instability * * * it is suggested that any State holding itself to be aggrieved by any such varying interpretation should be entitled to cite the co-

[32] Argentina: Doc. Dip. y Consulares. Bol. No. 17, 1903, 17-18.

[33] Señor Ernesto Frias, of Uruguay, read a paper in which he favored the abandonment of the most-favored-nation clause for a system of maximum, minimum, and special tariffs. Señor Julio Philippi, of Chile, argued that the most-favored-nation clause need not be considered incompatible with other systems of tariff policy, and urged that much of the inconvenience which attaches to the use of the clause on account of the uncertainty as to its interpretation could be avoided if nations would stipulate in the treaties in which they insert the clause just what interpretation is to be given it.

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[1] This bibliography is not meant to be exhaustive and includes only such works and articles as have contributed directly to, or have been found to have a direct bearing upon, points involved in this study. With a few exceptions, general works upon commerce and international law have been intentionally omitted.

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ITS FUNCTION IN THEORY AND IN PRACTICE AND ITS RELATION TO TARIFF POLICIES

BY

STANLEY KUHL HORNBECK, A. B.

Instructor in Political Science, University of Wisconsin

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